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CONVEYANCER'S NOTEBOOK

CONTRACTING OUT OF THE LANDLORD AND TENANT ACT, 1954

The Landlord and Tenant Act, 1954, passed into law with scarcely a murmur of protest from landlords and it appears to be sinking in rather slowly that Part II of the Act, giving security of tenure to tenants of business premises, is quite revolutionary. Conveyancers have been turning their minds to the question, to what extent it is possible to limit the rights given to tenants, particularly in the case of short tenancies. Section 43 excludes from the Act a tenancy for a term certain not exceeding three months unless there is a provision for renewal or the tenant has been in occupation for a period which, together with any period during which any predecessor in business of the tenant was in occupation, exceeds six months. One of our contemporaries suggests that in some cases an occupation exceeding three months may be taken outside the Act by the owner's granting a licence instead of a lease. As it has been said in the Court of Appeal on more than one occasion that a licensee may have exclusive occupation, it is extremely difficult to be at all sure that an instrument drafted as a licence will be treated as such by the courts, and this line of escape is probably open only in the most limited circumstances. There will be no difficulty where the owner wishes to resume occupation after the limited period, provided (i) he was in occupation at some time prior to the limited letting or he acquired the property at least five years before (s. 30 (2)); and (ii) he has excluded the right to compensation (s. 38 (3)). It should be borne in mind that Part II of the Act is different in kind from the Rent Restrictions Acts, for the court has no discretion under the former to refuse possession if the owner proves one of the statutory grounds. No drafting

difficulty arises in providing for the exclusion of compensation: all one has got to say is that it is excluded.

New leases may, however, be affected in other ways. For some time there has been a tendency to define precisely the user to which premises may be put, which may enable the landlord to prevent a tenant obtaining a premium for an assignment when the assignee is not purchasing the tenant's business or carrying on a similar one. And many landlords would like to impose an absolute covenant against assignment, but in practice few tenants will be prepared to accept a complete bar except in very special circumstances.

Options to Purchase and the Option-Giver's Assigns

In Vol. 18, at p. 579, Dr. J. H. C. Morris and Professor W. Barton Leach stated that options to purchase contained in leases "can never be enforced against the option-giver's assigns, for a reason which has nothing to do with the Rule against Perpetuities." Dr. E. O. Walford strongly contests this proposition, which he says is quite contrary to the generally accepted view and inconsistent with the Law of Property Act, 1925, ss. 1 to 4 and 6, and the provisions in the Land Charges Act, 1925, relating to registration of estate contracts. The Law of Property Act, 1925, s. 6, provides that nothing in Part I of the Act affects prejudicially the right to enforce any lessor's or lessee's covenants, agreements or conditions "(including a valid option to purchase or right of pre-emption over the reversion), the benefit or burden of which runs with the reversion or the term." Dr. Walford also refers to R. A. Holland in the *Conveyancer*, Vol. 13, pp. 49 *et seq.*, and *Hollington Brothers, Ltd.* v. *Rhodes* [1951] 2 All E.R., at p. 580, *per* Harman J. See also Dr. Walford in the *Conveyancer*, Vol. 12, pp. 258 *et seq.*

Dr. Morris replies that he had supposed *Woodall* v. *Clifton* [1905] 2 Ch. 257 was sufficient authority for the proposition that options to purchase the reversion contained in leases are not enforceable against the lessor's assigns, even though limited to the perpetuity period. Although in that case the option was not limited to the perpetuity period, the Court of Appeal did not think it necessary to discuss the Rule against Perpetuities, but held that the option could not be enforced against the lessor's assigns because it did not "touch and concern the land" within the meaning of the Graunties of Reversions Act, 1540 (now the Law of Property Act, 1925, s. 142). He goes on to say: "It is true that in *Wright* v. *Dean* [1948] Ch. 686 (the case discussed by Mr. Holland in his article), Wynn-Parry J. seems to have assumed that an option to purchase the reversion, contained in a lease for twenty-one years

would have been enforceable against the lessor's assigns if the option-holder had registered it as a land charge. But he did not decide the point: he merely decided that the original lessor was liable in damages. Mr. Holland thinks that though options to purchase the reversion contained in leases are not enforceable against the lessor's assigns *at law*, they are enforceable *in equity*, presumably under the doctrine of *Tulk* v. *Moxhay*. But it is elementary that the doctrine of *Tulk* v. *Moxhay* is limited to stipulations which are negative in substance: and, in *L. S. W. Ry.* v. *Gomm* (1882) 20 Ch.D. 562, all three members of the Court of Appeal were of opinion that an option is not within the doctrine of *Tulk* v. *Moxhay*, since it involves a promise to convey the fee (a positive act). Moreover, if options to purchase the reversion are enforceable in equity against the lessor's assigns, why was not the option in *Woodall* v. *Clifton* so enforced, since the Court of Appeal in that case was just as much bound to give effect to equitable claims as any other court has been since the Judicature Act? "

Dr. Morris adds that *Hollington* v. *Rhodes* seems to add nothing to *Wright* v. *Dean*. The only section referred to by Dr. Walford which bothers him at all is the Law of Property Act, 1925, s. 6, which in view of *Woodall* v. *Clifton* he frankly finds incomprehensible.

We hope we have set forth Dr. Walford's and Dr. Morris's views fairly. We must admit that we agree with Dr. Walford that most members of the profession would say that, if a lease confers an option to purchase limited within the perpetuity period, then the benefit does not run with the lease, but the burden does run with the reversion, provided it is duly registered as an estate contract, and we cannot see that fundamentally there is any difference between an ordinary contract to purchase and an option to purchase or that it makes any difference whether they are contained in a lease or not. The opening words of the judgment of the Court of Appeal in *Woodall* v. *Clifton* [1905] 2 Ch., at p. 278, are: " A contract in a lease giving an option of purchase might be good, without regard to the provisions of the statute of Henry VIII [the Graunties of Reversions Act], as binding the land in the hand of the heirs or assigns, provided it did not infringe the law as to perpetuities. It would not be the less a binding contract because it was contained in a lease." As we read these sentences, they confirm Dr. Walford's view.

Requisitioned Houses and Housing (Amendment) Bill

When statutory powers, originating in an emergency, are exercised for too long there is a tendency to forget their origin and

to cling limpet-like to them. As the central Government has been footing the requisitioning bill local authorities have shown a reluctance to derequisition. The Requisitioned Houses and Housing (Amendment) Bill may perhaps come as a rude shock to some local authorities, for it provides: (i) that the power to requisition land for housing purposes shall cease forthwith (clause 14); (ii) that houses already under requisition must be released not later than March 31, 1960 (clause 1); and (iii) that some of the requisitioning costs shall hereafter fall on the local authorities (clauses 2 and 10). There are provisions enabling an owner to apply for derequisitioning earlier than 1960 on the ground that he requires the house for his or his family's occupation, in which case the application is made to the county court, or on the ground of hardship, in which case application is made to the Minister (clauses 5 and 6). A local authority may invite the owner to accept the licensee as a statutory tenant protected by the Rent Restrictions Acts at a rent equal to the amount of the existing rental compensation plus the statutory repairs deduction, such rent being deemed to have been fixed before September 1, 1939, thus enabling the landlord to obtain an increase under the Housing Repairs and Rents Act, 1954. In addition the owner will receive compensation for the loss of the right to vacant possession (clause 4).

Housing Repairs and Rents Act, 1954

Services Increase. For those interested in statistics, it appears that, in general, where the larger property owners have applied to Rent Tribunals for services increases, they have been successful in obtaining between 70 and 100 per cent. of their claims—we have only heard of one case where the landlords got less than 70 per cent. Unfortunately, there is little to indicate what was disallowed and the grounds of disallowance, but it is quite clear that some tribunals (a) allow amortisation of lifts and other plant as an element in the services increase, and (b) allow items of repairs to figure both under section 23 for the purpose of satisfying the expenditure qualification for the repairs increase and again under section 40 as an element in the services increase. On the other hand, an argument put forward by tenants that in some cases night porters are partly for the benefit of the landlords for the protection of their interest (and to keep down the cost of insurance), so that the whole burden of the increase in their wages should not fall on the tenants appears to have carried weight. As tribunals do not often give reasons for their decisions it is largely a matter of surmise what views they take of the various arguments, but where they accept the landlords'

figures *in toto* it logically follows that they accept the principles applied in arriving at those figures.

Repairs increase—tenants' proportion. We are told that in one county court, where a tenant's agreement provided that he should keep the interior in repair (fair wear and tear excepted), it was held that the landlord was entitled to 100 per cent. of the authorised repairs increase, the tenant's liability being treated as negligible.

Stamp Duty on Assents to Beneficiary's Assignee

Mr. G. W. Quance writes:—

"In the first of his recent articles on the Law of Stamp Duties ((1953) 17 *Conveyancer*, at pp. 376–7) Mr. J. G. Monroe seems to be of the opinion that, where a beneficiary under a will has orally assigned his interest under the will to a volunteer, the consequent assents or transfers by the executors do not pass any beneficial interest, since that has already been passed by the oral assignment. Mr. Monroe suggests that the Revenue would consequently be forced to rely on the doctrine of 'all one transaction' as in *Cohen & Moore* v. *I. R. C.* ([1933] 2 K.B. 126), in order to levy stamp duty on the assents or transfers as voluntary conveyances. This would be so because a voluntary conveyance is a conveyance under which a beneficial interest passes; a conveyance under which no beneficial interest passes is not a voluntary conveyance.

"It is suggested that the Revenue would be able to designate such assents or transfers as voluntary conveyances without relying on the doctrine of 'all one transaction.' A will operates to pass an equitable interest in the property concerned to the beneficiaries thereunder and the legal estate alone vests in the personal representatives. Now an equitable interest in realty or personalty cannot be transferred other than by a disposition in writing signed by the person disposing of the same: section 53 (1) (*c*) of the Law of Property Act, 1925. In the case postulated by Mr. Monroe, the assignment by the beneficiary of his equitable interest is oral and by virtue of the above cited section it would not pass that beneficiary's equitable interest to the volunteer. This gives rise to two thoughts: first, that the beneficiary should join in the assent or transfer to release his equitable interest since a volunteer cannot rely upon the provisions of section 36 (7) of the Administration of Estates Act, 1925; secondly, that if the first course is followed the assent or transfer would certainly require stamping since it would pass both the legal estate and the equitable interest. This being so, it is submitted that in every such case the assent or transfer must

be stamped as a voluntary conveyance and in its own right, without having to rely on the doctrine of 'all one transaction.'

"The writer does not suggest that the above method should be used in practice. The agreement should be in writing and the assent should be in the normal form making no reference to the deed of arrangement. The writer is merely postulating the consequences of Mr. Monroe's hypothesis that there is only an oral agreement."

Mr. Monroe replies:—

"There is a great deal of force in Mr. Quance's main contention that the Revenue could stamp an assent or transfer made by a personal representative in favour of a donee from a legatee with *ad valorem* duty as a voluntary disposition without relying on the doctrine of 'all one transaction.' I do not think I attached sufficient importance to section 53 (1) (*c*) of the Law of Property Act, 1925 (which requires dispositions of equitable interests to be in writing) when I wrote the article in *The Conveyancer*, although it was on account of that section that I advisely spoke of a beneficiary 'agreeing to assign' his interest and not of his actually assigning it ((1953) 17 *Conveyancer*, at p. 376). I am not, however, satisfied that the right of a legatee to call for an assent is always 'an equitable interest or trust subsisting at the time of the disposition' within the meaning of section 52 (1) (*c*). In Williams on *Executors* (13th ed.), at p. 1103, it is stated to be a legal right and I do not think this is altered by section 9 and para. 3 of the 9th Schedule to the Law of Property (Amendment) Act, 1924. If it is a legal interest, it can, for the present purpose, be assigned orally only if an equitable assignment of a legal chose in action does not require to be supported by consideration, a question of some doubt: see *Re McArdle* [1951] Ch. 669. Whatever be the true view the Revenue can in my view exact *ad valorem* stamp duty on such assents.

"As to Mr. Quance's second point relating to the manner in which the transaction is carried out, if a beneficiary purports to assign his interest orally and for one reason or another it is not an effective assignment, it is at least an authority to the personal representative to act on it and he cannot complain if it is acted on. Accordingly, if an assent is made in favour of the donee without the beneficiary joining and is then not presented for stamping, it vests the legal and beneficial title in the donee and it may be that it will get by when the donee has to make title himself—for, although section 36 (7) of the Administration of Estates Act does not protect the donee any more than it would protect the beneficiary himself, the section will protect a purchaser from the donee (so far as it protects anyone having regard to *Re Duce & Boots' Contract*

[1937] Ch. 642) and the purchaser may perhaps not make any inquiry such as would lead him to discover the stamp objection. There is (if the oral pseudo-assignment can be proved) no other defect in the title. I do not myself recommend this method of carrying out the transaction any more than Mr. Quance does."

"APPEALS" FROM RENT TRIBUNALS

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It is well known, even amongst laymen, that there is no appeal as such from the decision of a rent tribunal. Amongst practitioners it is equally well known that such a decision, though not subject to appeal, is however in certain circumstances open to review in other ways by the superior courts. Since 1946, when rent tribunals were first constituted, it has been important for landlords that they and their legal advisers should be conversant with the means by which rent tribunal decisions made without jurisdiction may be, if not in all cases actually upset, at least circumvented. Now, since the coming into force of the Housing Repairs and Rents Act, 1954, it has become of importance to tenants that they and their legal advisers should possess the same knowledge. Under the Furnished Houses (Rent Control) Act, 1946, and the Landlord and Tenant (Rent Control) Act, 1949, most applications to rent tribunals have been made, not surprisingly, by tenants. It may now be expected that the majority of applications in respect of controlled premises will in future be made by landlords: see sections 24 (3) (b), 36 and 40 of the Housing Repairs and Rents Act, 1954. When applications in respect of furnished premises are taken into account it may be expected that in future the number of applications to rent tribunals will be divided approximately equally between landlords and tenants. The purpose of this article, therefore, is to explain the measures which may be taken by landlords and tenants when faced with rent tribunal decisions which have been made without jurisdiction. In addition attention will be drawn in passing to the conditions in which rent tribunal decisions other than those going to jurisdiction may be subject to review short of appeal.

By Certiorari, Prohibition and Mandamus

Throughout its long history the Court of King's Bench has always possessed an inherent power, now replaced by a statutory power, to superintend and control the proceedings of inferior courts and tribunals. For the greater part of the court's history the means by which control was exercised was by the prerogative writs of prohibition, mandamus and certiorari: see *Guide to Crown Office Practice* by J. O. Griffits, pp. 72, 160 and 200; *R. v. Northumberland Compensation Appeal Tribunal, ex p. Shaw, per* Denning L.J. [1952] 1 K.B. at 346 *et seq.*; the notes to R.S.C.,

Ord. 59 in the *Annual Practice*; and *Practice of the Crown Office*, 2nd edition (1908) by Short and Mellor, pp. 14, 197 and 252.

The prerogative writs were abolished by section 7 (1) of the Administration of Justice (Miscellaneous Provisions) Act, 1938, and replaced by orders of mandamus, prohibition and certiorari by section 7 (3) of that Act. These orders are much the same in character as the prerogative writs and the decisions on the latter appear to be applicable to the former.

Prohibition

An order of prohibition is the appropriate remedy when an inferior court proposes to exercise a jurisdiction which it does not possess but has not yet reached the stage of giving its decision. It is thus a preventive measure rather than a corrective measure and appears to be inapplicable where once the inferior court has given its decision: see Griffits (*op. cit.*) pp. 201, 202. Rent tribunals act comparatively speedily after the reference of a matter to them. An applicant for a prohibition must also, therefore, move speedily. By R.S.C., Ord. 59, r. 3 (4) the grant of leave to apply for an order of prohibition operates, if the court or judge so directs, as a stay of the proceedings in question. This sub-rule however appears to owe its authority not to the rule-making power in section 10 of the Act of 1938 (*supra*) but to section 113 of the County Courts Act, 1934. It may therefore not be possible, at any rate under this sub-rule, to obtain a stay of proceedings before a rent tribunal. For examples of cases in which orders of prohibition have been directed to rent tribunals, see *R.* v. *Hampstead, etc., Rent Tribunal, ex p. Ascot Lodge* [1947] K.B. 973; *R.* v. *Fulham Rent Tribunal, ex p. Littna* [1947] W.N. 214; *R.* v. *Paddington, etc., Rent Tribunal, ex p. Bell, etc., Properties* [1949] 1 K.B. 666. The procedure on an application for an order of prohibition is the same as for certiorari and is governed by R.S.C. Ord. 59.

Mandamus

An order of mandamus is an appropriate remedy where an inferior court has refused to exercise a jurisdiction which it does possess and it is desired to compel the exercise of that jurisdiction. The application must be made within a reasonable time after the inferior court has refused to act. It is entirely within the discretion of the court whether or not to grant an order of mandamus, and the court may refuse to make an order not only on the merits but also because of delay or for other reasons personal to the applicant: see Griffits (*op. cit.*), p. 161. Opportunities for applications for

orders of mandamus to rent tribunals are rare. It may be however that since the coming into force of the Housing Repairs and Rents Act, 1954, landlords may find increased use for this remedy (*a*). For a case in which mandamus to a rent tribunal was ordered, see *R.* v. *Folkestone, etc., Rent Tribunal, ex p. Webb* [1954] 1 Q.B. 454n. Procedure on an application for mandamus is the same as for certiorari and is governed by R.S.C., Ord. 59.

Certiorari

This was the oldest of the prerogative writs and was the process by which the King commanded the judges of any inferior court to certify the record of any proceedings in their court and to send it to the King's court to be examined so that the decision could if necessary be quashed or otherwise corrected: see the judgment of Denning L.J. in *R.* v. *Northumberland Compensation Appeal Tribunal, ex p. Shaw* [1952] 1 K.B. at 346, 347.

So far as rent tribunals are concerned the principal usefulness of certiorari lies in the correction of excesses of jurisdiction, but it will be seen that the scope of the remedy is not confined to such matters. Where a rent tribunal's jurisdiction depends upon the existence of a certain state of facts (for example, the existence of a tenancy) (*b*) they can inquire into those facts but cannot give

(*a*) See particularly ss. 24 and 40 of that Act. S. 24 (3) (b) provides, for the purpose of assessing the amount of a repairs increase, for the deduction from the recoverable rent of controlled premises of the amount determined by a rent tribunal to represent payment for furniture or services provided under the terms of the tenancy. However, since section 24 does not specifically give a tribunal power to make such a determination there is some doubt whether such a power exists except, perhaps, as an incident of giving a determination under s. 2 of the Act of 1946. If, therefore, on a landlord's application for a determination under s. 24 (3) (b) of the Act of 1954, the tribunal refuses to act, the only method by which the question as to the existence of the power can be settled is by an application for mandamus. Similar difficulties may arise in relation to s. 40 of the Act of 1954 because of the doubt which has arisen as to whether "services" in that section is limited to or is broader than the definition of that word in the Act of 1946.

(*b*) Other examples of questions preliminary to jurisdiction are: (1) under the Act of 1946: does the rent include payment for the use of furniture or for services?: see *R.* v. *Hampstead, etc., Rent Tribunal, ex p. Ascot Lodge* [1947] K.B. 973; *R.* v. *Croydon, etc., Rent Tribunal, ex p. Langford Property Co.* [1948] 1 K.B. 60; *R.* v. *Blackpool Rent Tribunal, ex p. Ashton* [1948] 2 K.B. 277; (2) under the Act of 1946: have the premises a standard rent below which the rent may not be reduced?: see *R.* v. *Paddington, etc., Rent Tribunal, ex p. Bedrock Investments* [1948] 2 K.B. 413; *R.* v. *Fulham, etc., Rent Tribunal, ex p. Marks* [1951] 2 K.B. 694; (3) under the Act of 1949: is the standard rent fixed by a letting beginning after September 1, 1939?; has there been any previous application for the determination of the reasonable rent?: see proviso to s. 1 (1) of the Act of 1949; (4) under the Act of 1949 as amended by the Housing Repairs and Rents Act, 1954: is the case within s. 36 (5) of the latter Act?; see also the questions in (3) above which are applicable; (5) under the Housing Repairs and Rents Act, 1954: whether any services within the meaning of s. 40 of that Act are provided for under the terms and conditions of letting or are in fact supplied: see also note (*a*), *supra*.

themselves jurisdiction by a wrong decision upon them and the High Court may inquire by way of certiorari into the correctness of the decision: see *R.* v. *London, etc., Rent Tribunal, ex p. Honig* [1951] 1 K.B. 641. Thus a rent tribunal may determine, as a question collateral to jurisdiction, whether an agreement is a sham, but if they come to a wrong decision on this point the decision will be liable to be quashed by certiorari: see *R.* v. *Hackney, etc., Rent Tribunal, ex p. Keats* [1951] 2 K.B. 15n., as explained in *R.* v. *Fulham, etc., Rent Tribunal, ex p. Zerek* [1951] 2 K.B. 1. As to the principles upon which a tribunal should proceed in determining whether an agreement is a sham, see *per* Lord Goddard C.J. and Devlin J. in the latter case, *ibid.*, at 7, 13–14.

Where the question of a rent tribunal's jurisdiction turns solely on a disputed point of law the High Court, on an application for certiorari, will usually determine it then and there. But where the dispute turns on a question of fact about which there is a conflict of evidence the court will generally decline to interfere: *per* Devlin J., *ibid.*, at 11. This is because the evidence given before the tribunal is verified, on the application to the court, by affidavit only and the court is usually content to act upon the materials disclosed before the tribunal; it rarely decides a question of fact itself: see also *R.* v. *London, etc., Rent Tribunal, ex p. Honig* [1951] 1 K.B. at 646, 647, *per* Lord Goddard C.J. The onus of showing that a tribunal's decision on a collateral question was wrong is on the applicant for certiorari; the onus is particularly high where that decision depended almost entirely on oral testimony: *Honig's* case, *ibid.*

Certiorari for errors of law not going to jurisdiction. It has already been stated that the principal usefulness of certiorari to rent tribunals lies in the correction of excesses of jurisdiction. However, the remedy is available also to correct errors of law not going to jurisdiction provided that they appear on the face of the record. Humphreys J., in *Zerek's Case* [1951] 2 K.B. at 8, has said that tribunals are not invested with any power to decide a question of law, and it is perhaps rare that they nowadays purport to do so. Nevertheless a rent tribunal may from time to time quite inadvertently, in a question which it has jurisdiction to decide, take into account a factor which they are not entitled to consider and thereby commit an error of law (*c*). In such a case,

(*c*) Suppose in an application to a rent tribunal under s. 40 of the Housing Repairs and Rents Act, 1954, there is evidence of some services which give the tribunal jurisdiction to make a determination under that section. Suppose also that in determining the appropriate increase of rent the tribunal has taken into account items which do not constitute "services" within the meaning of that section (see note (*a*) on p. 90, *supra*).

if the error appears on the face of the record or in reasons which the tribunal have chosen to give, their decision can be quashed by certiorari. Such errors are unfortunately difficult to detect unless there are many of them and they are unlikely to appear on the face of the record. Moreover, rent tribunals rarely give their reasons. Opportunities to employ certiorari to correct errors of law not going to jurisdiction are, in the case of rent tribunals, therefore likely to be rare. The following principles extracted from the judgment of Denning L.J. in the *Northumberland Case* [1952] 1 K.B. at 346 *et seq.*, may nonetheless be of interest:—

(1) The governing rule is that the error of law must appear on the face of the record.

(2) The record consists of the following documents: the document initiating the proceedings (*i.e.*, the reference), the the pleadings (*i.e.*, the landlord's and tenant's statements), if any, and the adjudication (*i.e.*, the decision or determination). It does not contain the evidence nor the reasons unless the tribunal choose to incorporate them.

(3) When certiorari is granted on the ground of want of jurisdiction, or bias, or fraud, affidavit evidence is not only admissible but it is, as a rule, necessary. When it is granted on the ground of error of law on the face of the record, affidavit evidence is not, as a rule, admissible, for the simple reason that the error must appear on the record itself.

(4) Notwithstanding the strictness of the rule that the error of law must appear on the face of the record, the parties can always by agreement overcome this difficulty. Thus, affidavits have been treated by consent as if they were part of the record and have made the order a speaking order.

(5) An error admitted openly in the face of the court can be corrected by certiorari as well as an error that appears on the face of the record.

Certiorari in other cases. It has already been indicated (in (3) above) that there is a third class of case to which certiorari is applicable: *viz.*, where a decision has been obtained by fraud or there has been bias on the part of the tribunal. Fraud includes perjury: see *R.* v. *Recorder of Leicester, ex p. Wood* [1917] K.B. 726.

Procedure

Before an application for an order of certiorari can be made, the leave of the court must first be obtained. The application

for leave is made *ex parte* to the Divisional Court of the Queen's Bench Division or to a judge in Chambers: see Order 59, rr. 3 (2) and 10. The application for leave must be accompanied by a statement of the applicant's name and description, the relief sought and the grounds on which it is sought. An affidavit or affidavits verifying the facts relied on must be filed. A further affidavit exhibiting the decision complained of is also required.

The application for leave must be made not later than six months after the date of the decision in question. There is power to extend this time limit but it appears that the power is exercised only where there are strong grounds.

After leave has been obtained the application for an order is made by notice of motion to the Divisional Court or, in vacation, by summons to a judge in chambers. Further as to procedure see Order 59 and Griffits, *op. cit.*, pp. 74 *et seq.*

By Declaration and Injunction

Declaration

Where a statutory tribunal (of which a rent tribunal is an example) has acted without jurisdiction the High Court has power to grant a declaration that the tribunal's decision or determination is null and void: see *Andrews* v. *Mitchell* [1905] A.C. 78; *Cooper* v. *Wilson* [1937] 2 K.B. 309; *Lee* v. *Showmen's Guild of Great Britain* [1952] 2 Q.B. 329, at 345, 346, *per* Denning L.J.; *Barnard* v. *National Dock Labour Board* [1953] 2 Q.B. 18. The power is in addition to the remedy by way of certiorari, but a declaration is unlikely to be granted where certiorari is available. Nevertheless the power is entirely discretionary. Denning L.J. in *Barnard's* case said (*ibid.* at 41): "I know of no limit to the power of the court to grant a declaration except such limit as it may in its discretion impose upon itself; and the court should not, I think, tie its hand in this matter of statutory tribunals."

A declaration then is a useful remedy particularly in a case where certiorari does not lie. It appears that it is immaterial whether assumption of jurisdiction was founded on an error of law or an error of fact except that, if all the facts were before the tribunal and if the existence of jurisdiction is a reasonably possible inference from the facts, the court is unlikely to interfere: *Lee's* case, *supra*; *Barnard's* case, *supra*. Certiorari is sometimes not available because an application would be out of time or, perhaps, because the facts are not all known. Thus, if a landlord has obtained a determination of the reasonable rent under section 1 of the Act of 1949 (as amended by the Act of 1954, s. 36), and if in

such circumstances the tenant has no knowledge but merely a suspicion of a pre-1939 letting establishing a standard rent or of a previous determination of the standard rent (either of which eventualities would oust jurisdiction), certiorari would be useless since discovery of documents cannot be had on such an application. However, discovery is available in an action for a declaration and as in *Barnard's* case, *supra*, it might, in the circumstances mentioned, be the only means enabling the tenants to obtain redress.

The proper defendants to an action for a declaration appear to be the rent tribunal and the landlord or tenant, as the case may be, who has obtained the adverse decision. An order for discovery against the tribunal would probably be of little assistance but, as against the other defendant, it can as indicated above be vital. It does not appear possible to join alternative claims for certiorari and a declaration. This is because of the obvious differences in procedure between the two remedies. It would appear that, as with certiorari, the onus of proof of want of jurisdiction in the tribunal is upon the applicant for a declaration.

Some of the observations in the cases suggest that an action for a declaration is available to correct not merely excesses of jurisdiction but also errors of law not going to jurisdiction: see the headnote to *Barnard's* case in [1952] 2 T.L.R. 309 and *per* McNair J. at 312; see also the headnote to the decision of the Court of Appeal in that case in [1953] 2 Q.B. 19; more particularly see the words of Denning L.J. ([1953] 2 Q.B. at 41) quoted above. The Lord Justice continued: "It is axiomatic that when a statutory tribunal sits to administer justice, it must act in accordance with the law. Parliament clearly so intended. If the tribunal does not observe the law, what is to be done? The remedy by certiorari is hedged round by limitations and may not be available. Why, then, should not the court intervene by declaration and injunction? If it cannot so intervene, it would mean that the tribunal could disregard the law, which is a thing no one can do in this country." Further, in *Lee's* case ([1952] 2 Q.B. at 346) Denning L.J. said: "the remedy by declaration and injunction . . . can be as effective as, if not more effective than, certiorari. It is, indeed, more effective, because it is not subject to the limitation that the error must appear on the face of the record." Thus, indeed, there appears to be no limit to the power of the court to grant a declaration except such limit as the court in its discretion may choose to impose. *Lee's* case was a case of excess of jurisdiction; in *Barnard's* case the question, if not of jurisdiction, was certainly akin to it, and the observations mentioned above were not necessary to the decisions. The point discussed in this paragraph is, therefore, still open.

One disadvantage of a declaration might seem to be that its effect may be personal to the parties to it. However, this is probably not a practical difficulty because of the rules that a rent tribunal decision made without jurisdiction is void for all purposes and that the maxim *omnia praesumuntur rite esse acta* does not cure the defect of jurisdiction: see *R.* v. *Judge Pugh, ex p. Graham* [1951] 2 K.B. at 629. The one real disadvantage of an action for a declaration lies in the fact that it is an entirely discretionary remedy.

Injunction

Before 1938, if any person usurped the functions of an office, judicial or otherwise, belonging to the Crown, an information in the nature of *quo warranto* would lie to restrain him from so acting. Informations of this kind were abolished by section 9 of the Administration of Justice (Miscellaneous Provisions) Act, 1938. In cases where, apart from that Act, *quo warranto* would lie, section 9 (2) of that Act now substitutes an injunction. Such an injunction would obviously be available to restrain a rent tribunal, whose members' appointments were defective, from acting. For the procedure on an application for such an injunction, see Griffits (*op. cit.*), pp. 130 *et seq.*

It does not appear that in *Barnard's* case any injunction was either granted or applied for. In *Lee's* case injunctions to restrain the defendants from taking steps consequent upon the decision complained of were granted. Neither those injunctions nor those to which Denning L.J. referred in the passages quoted above from his judgments in the two cases were injunctions of the kind to which section 9 (2) of the 1938 Act applies. They were in fact the ordinary kind of injunction invented by the courts of equity and now available to all courts: see *per* Denning L.J. in *Barnard's* case ([1953] 2 Q.B. at 42). The only defendant in the case of a rent tribunal decision against whom an injunction of this kind is likely to be of use is the tribunal itself. The only purpose of obtaining such an injunction against the tribunal would normally be to prevent the tribunal from notifying their determination to the local authority for the purposes of registration of rents under sections 3 of the 1946 Act and 5 of the 1949 Act. Naturally the applicant for an injunction would, literally, have no time to lose in issuing the writ and applying for an interim injunction. It therefore appears that a claim for an injunction to a rent tribunal in addition to a declaration will rarely be found to be a useful remedy. In so far as the matter is of interest the remarks above relating to declarations apply to injunctions.

Declaration and Injunction in County Courts

It is not possible to claim a declaration and/or an injunction in the county court unless the claim is ancillary to a claim which is within the county court jurisdiction (*d*): see County Courts Practice, 1954, pp. 40, 964. Thus if a rent tribunal has at the instance of the tenant reduced the rent of premises under section 2 of the Act of 1946, and had no jurisdiction to do so, the landlord can, if he sues in the county court for rent at the full contractual rate, add a claim for a declaration that the decision of the rent tribunal was null and void. It would seem to be doubtful whether the tribunal could be joined as a defendant in this case, since *vis-à-vis* the tribunal the claim would be for a declaration *simpliciter* without the addition of a substantive claim.

In an Ordinary Action

A simple efficacious and inexpensive method of dealing with an adverse rent tribunal decision made without jurisdiction is suggested by the Divisional Court case, *R.* v. *Judge Pugh, ex p. Graham* [1951] 2 K.B. 623. In that case a rent tribunal had on the application of the tenant of a controlled house determined the reasonable rent under section 1 of the Act of 1949 and, in so doing, in effect reduced the standard rent. Subsequently the tenant applied to the county court for an apportionment of the rent of the premises in which his house was contained and he alleged a pre-1939 standard in respect of the containing premises. The county court judge upheld the landlord's objection that the county court had no jurisdiction in the matter since the rent tribunal had already determined the reasonable rent. It was held by the Divisional Court that the county court judge was bound to hear the application for apportionment. The following principles are elicited from the judgments:—

(1) The existence of the rent tribunal decision was not a matter going to the jurisdiction of the county court but was a matter of defence; *per* Lord Goddard C.J. [1951] 2 K.B. at 628;

(2) Parties cannot by their own action give a rent tribunal jurisdiction: *ibid.*;

(*d*) Consider, in relation to a rent tribunal decision affecting controlled premises, whether a claim for a declaration that the tribunal's decision is null and void is a claim arising out of the Acts within the meaning of s. 17 (2) of the Act of 1920 and, if so, whether the claim may be brought in the county court under that subsection without the addition of a substantive claim: see *Butler* v. *Hudson* [1953] 2 Q.B. at 420; *Harper and Sewell* v. *Foster* (1952) L. J. News. 268 (County Court).

(3) A rent tribunal decision made without jurisdiction is *coram non judice et tout oustrement void*—void to all intents and purposes; the maxim *omnia praesumuntur rite esse acta* does not apply to give the tribunal jurisdiction; it follows that where a rent tribunal decision is relied on by one party to proceedings as conclusive against the other, it must be shown by the person who relies on that decision that the tribunal had jurisdiction: *ibid.*, at 629.

(4) The powers which the Divisional Court exercises by way of certiorari and mandamus are not exclusive powers but are powers which the court exercises in order to give a speedy remedy against obvious errors of jurisdiction; when any question is raised in proceedings in the High Court or county court as to the jurisdiction of a rent tribunal that question must be tried by the court before which it is raised: *per* Devlin J., *ibid.*, at 630. See also *Briscoe* v. *Stephens* (1824) 2 Bing. 213; *R.* v. *Fulham, etc., Rent Tribunal, ex p. Zerek* [1951] 2 K.B. at 10, 11, *per* Devlin J.

Thus, where a rent tribunal has reduced the rent of premises under section 2 of the Act of 1946, the landlord can put the validity of that decision to the test by the simple expedient of suing for the full contractual rent (*e*). If the tenant relies on the tribunal's decision the onus will be on him to prove that the tribunal had jurisdiction. It is immaterial whether the application to the tribunal was made by the tenant or by the landlord himself. If the decision was made under section 1 of the Act of 1949 the action will of course be for the full recoverable rent (*i.e.*, the original standard rent plus permitted increases).

Similarly, where rent has been increased as a result of a tribunal's determination under section 24 (3) (b) or section 40 of the Act of 1954 or section 1 of the Act of 1949 as amended by section 36 of the Act of 1954, the tenant's remedy is to refuse to pay the increase. If the landlord sues him for it, it is the landlord who must rely on the tribunal's decision and the onus of proof of the tribunal's jurisdiction will therefore be upon the landlord.

It would not seem politic for either party to such an action to add a claim for a declaration that the tribunal's decision was invalid, since the claimant for the declaration would appear to

(*e*) Where the rent payable for any premises is entered in the register under the provisions of the Act of 1946 it is, of course, an offence to require or receive payment of any sum in excess of the rent so registered: Act of 1946, ss. 4 and 9. This, however, is a penal provision which must be strictly construed. If the tribunal had no jurisdiction to determine a rent and if their decision is void for all purposes, it is difficult to see how registration of the rent can have any effect. Moreover, in such circumstances it would seem not to have been "entered in the register under the provisions of this Act."

be transferring to himself the onus of proof as to the tribunal's jurisdiction.

Conclusion

Certiorari is the most effective means of upsetting a rent tribunal decision made without jurisdiction. Its effect is to quash the decision for all purposes and, in a rent case, to nullify any registration of the rent. However, it has been seen that certiorari is not always available. A declaration is a useful remedy but it is not likely to be granted if certiorari is available. Moreover, it is an entirely discretionary remedy. An injunction, coupled with a declaration, is, it has been seen, rarely of usefulness in rent tribunal cases. In cases in which certiorari is thought not to be available or to be too expensive a remedy, the method of ignoring the tribunal's decision and suing for the full rent (or, in the case of a tenant, withholding the increase and leaving the landlord to sue) has many obvious advantages. First it is inexpensive since most such actions would be in the county court. Secondly, unlike the remedies by way of certiorari or declaration, it casts the onus of proof on the party relying on the tribunal's decision. Finally, whereas the Divisional Court, on an application for certiorari, will not determine a disputed question of fact giving to jurisdiction, the county court or other court trying the action must do so. It has already been noticed that certiorari is a special remedy and cannot be joined with claims for other remedies of a different character. It has also been noticed that it is inadvisable to join a claim for a declaration in an action of the type discussed above.

REGISTRATION OF ESTATE CONTRACTS

By R. Geoffrey Rowley, ll.d., Solicitor

The past decade has offered an interesting variety of cases dealing with estate contracts, and the recent decision in *Re Rayleigh Weir Stadium* (*a*) affords a convenient opportunity of reviewing the authorities concerning this most common of all land charges, and of discussing the interpretation of what, until recently, was regarded as the clear and precise wording of the Land Charges Act, 1925, s. 10 (1) Class C (iv). Class C concerns obligations affecting land, whenever created, but if created prior to 1926 only if acquired under a post-1925 conveyance, and " an estate contract " is defined as :

" Any contract by an estate owner or by a person entitled at the date of the contract to have a legal estate conveyed to him to convey or create a legal estate, including a contract conferring either expressly or by statutory implication a valid option of purchase, a right of pre-emption or any other like right."

This definition can most readily be considered under the following subdivisions :—

(a) " Any contract . . . to convey or create a legal estate,"

(b) " By an estate owner,"

(c) " By a person entitled at the date of the contract to have a legal estate conveyed to him."

Any Contract . . . to Convey or Create a Legal Estate

This sets out the essence of an estate contract, and the further qualifications as to who can make such a contract are relevant only to the question whether the contract is registrable as a land charge. For the purposes of the Law of Property Act, 1925, an estate contract is merely defined as " any contract to convey or create a legal estate," etc. (*b*), with no limitation on the date of the contract. The need for a separate definition is clear, since the Law of Property Act, 1925, is dealing with equities which will not be overreached by an *ad hoc* settlement or trust for sale, and must therefore include a pre-1926 contract for sale, whether assigned after 1925 or not, and a pre-1926 contract might be made

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(*a*) [1954] 1 W.L.R. 786.
(*b*) L.P.A., 1925, s. 2 (3).

by a person who, under the new system of legal estates, is no longer an "estate owner." The Land Charges Act, 1925, on the other hand, relates only to the classification of land charges which are registrable. There are, therefore, two classes of estate contracts :

(1) Those which comply with the Land Charges Act, 1925, definition, and are void as against a purchaser of a legal estate for money or money's worth unless registered, and

(2) Those which comply with the Law of Property Act, 1925, definition, but are either :

(a) made before 1926 and not subsequently assigned (a species which must by now be virtually extinct); or

(b) made by a person who is neither an estate owner nor a person entitled to call for a legal estate.

To this latter class of estate contracts the old law of notice will still apply. This is, indeed, specifically provided by section 2 (5) of the Law of Property Act, 1925, with regard to pre-1926 contracts, though it seems there to be assumed that all other estate contracts within the Law of Property Act definition are registrable under the Land Charges Act, 1925 (*c*).

There are conflicting views whether an estate contract need be in writing. Normally, of course, a memorandum in writing will be necessary in view of the provisions of section 40 (1) of the Law of Property Act, 1925, and it appears that such a memorandum will be adequate (*d*). The provision of the Land Charges Act, 1925, s. 10 (3), that "where a land charge is not created by an instrument (*e*), short particulars of the effect of the charge shall be furnished with the application to register the charge" contemplates that some land charges will not be created by writing, and Jenkins L.J. in *Universal Permanent Building Society* v. *Cooke* (*f*) observed that, in view of this provision, "it seems clear that in fact writing is not essential to the registrability of a contract or charge." Further, it seems reasonable that where a contract to convey or create a legal estate has been partly performed (*g*) and would be enforced by the court, it should be capable of registration as a land charge.

(*c*) The dovetailing of "land charges" definitions with "equitable interest" definitions is careless in several respects. The L.P.A. refers to "option to purchase," the L.C.A. to "option of purchase"; the L.P.A. refers to "any easement, liberty, or privilege," the L.C.A. to "any easement right or privilege."

(*d*) See *Re Rayleigh Weir Stadium* [1954] 1 W.L.R. 786, where a contract evidenced only by a receipt was regarded as registrable.

(*e*) "Instrument" is not defined in the L.C.A., 1925, but in the L.P.A., 1925, s. 205 (1) (vii), it does not include a statute unless the statute creates a settlement.

(*f*) [1952] Ch. 95. The observation was *obiter*.

(*g*) In the *Universal P. B. S.* case (*supra*) a contractual purchaser had let a prospective lessee into possession.

There are, however, weighty arguments for the view that writing is necessary for the creation of a registrable estate contract. The provisions of section 10 (3) of the Land Charges Act, 1925, are by no means conclusive, for these were no doubt designed to meet the case of the statutory charges; the subsection does not and cannot import that all land charges may be created without writing, otherwise we would have parol puisne mortgages (*h*). Further, other sections of the Land Charges Act, 1925, certainly contemplate that estate contracts will be created only by instruments : the Lord Chancellor is empowered to make rules providing for registration of estate contracts, by reference to the instrument creating the interest or an extract therefrom (*i*), and the original section 10 (6) of the Act (*k*) provided that in the case of an estate contract affecting land within any of the three Ridings of Yorkshire, registration in the local deeds registry " of the document creating it shall be sufficient, and the registration shall as respects such land have effect as if the land charge created by the document had been registered under this Act." Finally, although a parol contract may well be within the Law of Property Act, 1925, definition, surely it is not too much to ask that a person wishing to register a contract to convey or create a legal estate should first obtain documentary evidence of that contract. It appears to the writer that these arguments outweigh the vague indication of section 10 (3) and that accordingly, to be registrable as a land charge, an estate contract should be evidenced in writing.

It need scarcely be said that there must, in all cases, be a contract, whether written or by parol, and the mere fact that an estate owner holding in trust for persons entitled in undivided shares will have to appoint a new trustee to enable a good receipt to be given for the purchase money prior to a sale does not constitute an agreement to convey the property to trustees for sale (*l*). On the same principle, it is suggested that a devisee cannot register an estate contract against executors, nor a beneficiary against trustees.

The final point which has been established under this head is

(*h*) A similar problem has arisen whether restrictive covenants must be written, and it is generally accepted that writing is necessary—see *Hodges* v. *Jones* [1935] Ch. 657.

(*i*) L.C.A., 1925, s. 19 (1) (b); Land Charges Rules, 1925, r. 9 (2) (b).

(*k*) Repealed and re-enacted by the Law of Property (Amendment) Act, 1926.

(*l*) This seems to be the result of *Re Rayleigh Weir Stadium* [1954] 1 W.L.R. 786, although it appears that in this case the alleged obligation to convey to trustees existed several years before the alleged estate contract, and it is difficult to see how it was contended that a contract entered into in 1953 was an estate contract by virtue of an obligation arising out of a trust for sale imposed in 1948.

that the contract need not provide for the legal estate to be conveyed or created in favour of the other party to the contract, so if A contracts with B to sell his house to C, that is registrable as an estate contract (*m*).

By an Estate Owner

An estate contract, for the purpose of registration as a land charge, must be made either by an estate owner or by a person entitled to have a legal estate conveyed to him. The former alternative appears the more simple and, indeed, were it not for the Court of Appeal decision in *Sharp* v. *Coates* (*n*), it would be necessary only to point out that an "estate owner" means the owner of a legal estate (*o*). In this case, Asquith L.J. said that one limitation must be read into the literal meaning of the definition: "The estate owner must have an estate of some sort in the same lands in respect of which he contracts to convey or create an estate in favour of someone else. Hence, an owner of an estate in Whiteacre who contracts to convey or create an estate in Blackacre would presumably not be an estate owner within this provision." But his Lordship refused to draw the further implication—which it is respectfully suggested is *ejusdem generis*—that the estate owner must have the legal estate which he contracts to convey, or a legal estate out of which he can carve the estate which he contracts to create. The decision in *Sharp* v. *Coates* illustrates the peculiarities of the resulting position. R, a yearly tenant of land under his mother, and as such an estate owner (*p*), in turn sublet on a yearly tenancy to C, and agreed that, if the reversion became vested in him during the subtenancy, he would grant to C a ten years' lease; R subsequently inherited the freehold and sold to S, who bought with notice of the terms of C's tenancy. It was held that C's rights, not being registered as an estate contract, were void against S. It is clear that, had R not been a tenant himself at the date of the option, the contract being made by a person with a mere *spes successionis* would not have been registrable. If, therefore, a weekly tenant contracts that in the event of his purchasing the freehold he will grant a lease, the contract is registrable; but such a contract made by a person actively negotiating for the purchase who has not yet exchanged

(*m*) *Turley* v. *Mackay* [1944] Ch. 37; see also *Re Rayleigh Weir Stadium* (*supra*).

(*n*) [1949] 1 K.B. 285.

(*o*) L.C.A., 1925, s. 20 (1), importing L.P.A., 1925, s. 205 (1) (v).

(*p*) Even a weekly tenant is an "estate owner"—see *Coventry Economic Building Society* v. *Jones* [1951] 1 All E.R. 901; Woodfall on *Landlord and Tenant* (25th ed.), p. 281.

contracts, is not registrable. On this construction, Class C (iv) reads : " A contract by the owner of one legal estate . . . to convey or create another legal estate," and it is difficult to see why the quantum of the legal estate should not be as integral a part of the definition as the identity of the land.

A further qualification must be implied in the definition, that the estate owner referred to must be an estate owner at the date of the contract (*q*). Indeed, if " estate owner " includes future estate owners the additional wording " or by a person entitled at the date of the contract to have a legal estate conveyed to him " becomes superfluous.

By a Person Entitled at the Date of the Contract to have a Legal Estate conveyed to him

This definition clearly rules out a contract by a person who has only an intention of purchasing land for resale, or a *spes successionis*, even if he subsequently acquires a legal estate in the land affected, unless (according to the decision in *Sharp* v. *Coates*) he also chances to have some legal estate, however small, in the property. In this connection, *Turley* v. *Mackay* (*r*) occasions some difficulty : a principal contracted with agents that, on his acquiring a site, he would dispose of it under the directions of the agents. It does not appear that the principal was either an estate owner or entitled to call for a legal estate at the date of the contract, yet it was held that the estate contract was capable of registration (*s*).

Examples of this class of estate contract are to be found in the case of tenancies created by contractual purchasers (*t*). It appears that a devisee under a will, a beneficiary absolutely entitled to trust property, or a tenant for life entitled to call for a vesting deed will also come within this category (*u*).

Mode of Registration

Section 10 (2) of the Land Charges Act, 1925, provides merely that " A land charge shall be registered in the name of the owner whose estate is intended to be affected." Normally this will give rise to no difficulty, since the estate owner against whom a charge

(*q*) Lord Goddard C.J. in *Sharp* v. *Coates* [1949] 1 K.B. 285 supports this view.

(*r*) [1944] Ch. 37.

(*s*) The judgment in this case was, however, directed to another point, and this question was not argued.

(*t*) *Coventry Economic B. S.* v. *Jones* [1951] 1 All E.R. 901; *City Permanent B. S.* v. *Miller* [1952] Ch. 840.

(*u*) *Cf.* S.L.A., 1925, s. 11.

will be registered is usually a party to the charge or obligation, but complications arise in two cases :—

(1) Where the contract is entered into by a person who is not yet an estate owner; and

(2) Where the estate owner entering into the contract has died or disposed of his estate.

Again, the only relevant authority is the judgment of Lord Goddard in *Sharp* v. *Coates*, where he observes, in connection with section 10 (2), that if the owner of a limited interest in property contracts "that if, during the continuance of the agreement which he has made with the other party to grant him a yearly tenancy, his interest becomes enlarged, he will grant him a larger interest, he is making an agreement which affects his interest as an estate owner," and later, that he "was an estate owner at the time the agreement was made, and his estate was affected." The consequence appears to be that the estate contract should have been registered against the yearly tenant, and not against his mother who was at that time the freeholder. The mechanics of registration were not, however, in question, and it is submitted that, whilst for the purposes of the definition in Class C (iv) "estate owner" means "estate owner at the date of the contract," this qualification cannot be imported into the definition of "estate owner" for the purpose of registration. Section 10 (2) affects all land charges, not merely estate contracts, and should not therefore be limited by a qualification appearing from the definition of one land charge only, and in any event the Act itself contemplates the registration of certain pre-1926 land charges, which may have been created by persons who are not "estate owners" within the definition of the 1925 legislation, yet such charges must be registrable (*a*).

It is therefore suggested that registration can be effected at any time (there is no time limit on the registration of land charges (*b*)) against the person who, at the date of registration, is the owner of the legal estate intended to be affected by the charge, namely, the estate contracted to be conveyed or the estate out of which the interest contracted to be created is to be carved. Section 10 (2) does not make the same distinction as Class C (iv) between estate owners and persons entitled to call for a legal estate, and, whilst a contract may be entered into by a person

(*a*) *e.g.*, mortgagors of freeholds prior to 1926, who had only an equity of redemption and no legal estate.

(*b*) Except for the assignment of pre-1926 Class C charges, and the registration of mortgages by companies, registration is permissive, not obligatory—see *Wright* v. *Dean* [1948] Ch. 686.

who has no legal estate, it can be registered only against an estate owner. It may be contended that such a contract is registrable in the name of the person entitled to call for legal estate, but that registration remains in suspense until he acquires the legal estate (*c*), particularly in view of the practical difficulty that a subpurchaser may not know the name, or even the existence (*d*), of the original vendor. Against this it is arguable that the Act no more provides for inchoate registration than for the registration of inchoate charges, and that whilst the Registers of Pending Actions, of Writs and Orders, and of Deeds of Arrangement contemplate registration against persons other than estate owners (*e*), the Register of Land Charges does not (*f*).

The whole object of the Registers is to enable a purchaser, who can trace the names of previous estate owners from the abstract of title (which since 1925 normally deals only with legal estates), to ascertain by searching any charges registered against such estate owners, and it appears more consonant with the policy of the Acts that where A contracts to sell to B, who in turn contracts for subsale to C, C should register his estate contract against A (*g*). The difficulty arises from the provision in the Act for registration against an estate owner of charges which may be created by persons other than an estate owner (*h*). It is difficult to see why a contractual obligation, unsupported by a legal estate, should be registrable at all.

By virtue of section 13 (2) of the Land Charges Act, 1925, an estate contract is void against a purchaser of a legal estate for money or money's worth unless registered before the completion of the purchase, but there seems to be no reason why registration should not be effected at any time prior to the intervention of a sale for money or money's worth, either against the original estate owner at the time of the contract or against his successors in title.

If the view expressed above is accepted, two curiosities arise

(*c*) See Emmett on *Title* (13th ed.), p. 558: "If A, who has agreed to purchase a legal estate in land, contracts to resell to B, then an estate contract registered in A's name will not be effective until the legal estate is conveyed to A."

(*d*) See *Gordon Hill Trust* v. *Segall* [1941] 2 All E.R. 379, where it was held that a contractual purchaser can in re-selling describe himself as "owner."

(*e*) L.C.A., 1925, s. 2 (2) (a), s. 6 (2) and s. 8 (1).

(*f*) L.C.A., 1925, s. 10 (2); L.C.R., 1925, r. 6 (a) and see Form L.C. 4

(*g*) See Halsbury's *Statutes*, vol. 20, p. 1082; Emmett on *Title* (13th ed.), p. 558.

(*h*) The difficulty is not exclusive to estate contracts. The definition of a restrictive covenant in Class D (ii) does not specify that it must be made by an estate owner, and a covenant entered into by a person having only an option to purchase does not seem to be invalid on this ground—see *L. C. C.* v. *Allen* [1914] 3 K.B. 642.

from the decision in *Sharp* v. *Coates* : that if a contractual purchaser enters into an estate contract, this must be registered against the original vendor, unless the contractual purchaser is also a weekly tenant of the property, when the registration will be made against him as the owner of a legal estate affected; and that, if a weekly tenant enters into an estate contract relating to property in which he has a *spes successionis*, the contract will cease to be registrable on his surrendering the tenancy.

Conclusion

In view of the grave effects of non-registration, which renders a land charge unenforceable even against a purchaser with actual notice, it is clearly important to ascertain what rights are capable of registration, and practitioners understandably err on the side of inclusion rather than of exclusion, but the definition of the three land charges which cannot by their nature attach to the purchase money—estate contracts, restrictive covenants and equitable easements—has in each case given rise to difficulties. The most that can be said is that the system of land charges registration works well enough where notice by virtue of registration is coupled with actual notice, but the referential effect of registration by way of notice is unsatisfactory, since a statutory enactment that a purchaser has notice, when in fact he has no notice and in some cases no power to make the necessary searches, inevitably leads to injustices. Further, notice in fact is dependent on a number of ephemeral factors, whilst statutory notice is apparently perpetual. The profession will welcome the announcement that a Committee has been appointed to inquire, under the chairmanship of Mr. Justice Roxburgh, into some aspects of these problems.

THE DOCTRINE OF WASTE AND TRUSTS FOR SALE

By Hamish R. Gray, ll.m., Solicitor

Some years ago, the late Dr. Harold Potter writing in this journal shortly after the decision in *Re Harker's Will Trusts* (*a*) criticised the application of the common law doctrine of waste to strict settlements of land (*b*). His argument was that since waste was an incident of legal estates not of inheritance, it should be inapplicable to the modern strict settlement where the person chargeable normally has the legal estate in fee simple. It is now suggested that it may be even more material to consider whether the doctrine of waste applies to the beneficial interests arising under settlements of land by way of trust for sale.

The way in which this problem may arise will be illustrated by reference to timber estates, but the considerations involved are of general application. Its practical significance is paramount : a trustee must know whether, and if so how, to apportion money coming into his hands (to use a neutral expression) between the tenant for life and capital, and with this goes the attendant problem of liability for income tax (*c*).

The difficulties facing a practitioner advising in a case where timber estates are held upon trust for sale may be summarised in the form of three questions :

(1) Are the trees in question " timber " in the strict sense ?

(2) If the trees are technically timber, are the proceeds of their sale income or capital ?

(3) If the proceeds of sale are income, does the doctrine of waste apply ?

Whether the trees are timber in the strict sense

The classic exposition of the law on the nature of " timber " is to be found in the judgment of Sir George Jessel M.R. in *Honywood* v. *Honywood* (*d*). He says : " By the general law of England, oak, ash, and elm are timber, provided they are of the age of twenty years and upwards, provided also they are not so

(*a*) [1938] Ch. 323.

(*b*) (1938) 2 *Conveyancer* (n.s.), at p. 233, " Waste and the Settled Land Act." See also (1944) 8 *Conveyancer* (n.s.) p. 147, at pp. 154–6.

(*c*) In addition where the trust arises as the result if a death occurring before July 30, 1949, succession duty may be payable.

(*d*) (1871) L.R. 18 Eq. 306, *per* Sir George Jessel M.R., at p. 309.

old as not to have a reasonable quantity of useable wood in them, sufficient, according to a text writer, to make a good post. Timber, that is, the kind of tree which may be called timber, may be varied by local custom. There is what may be called the custom of the country, that is, of a particular county or division of a county, and it varies in two ways. First of all, you may have trees called timber by the custom of the country—beech in some counties, hornbeam in others, and even whitehorn and blackthorn and many other trees, are considered timber in peculiar localities—in addition to the ordinary timber trees. Then again, in certain localities, arising from the nature of the soil, trees of even twenty years old are not necessarily timber, but may go to twenty-four years, or even to a later period, I suppose, if necessary; and in other places the test of when a tree becomes timber is not its age but its girth." Thus in *Dashwood* v. *Magniac* (*e*) beech trees in the settlor's estates in Buckinghamshire were held to be timber, while in those estates which were in the neighbouring county of Oxford the beech trees were not timber.

The important point, however, is that the owner of a limited estate in land, such as a tenant for life or for years, may not cut timber if he be impeachable for waste. The tenant for life is entitled only to the income from the land and the capital value of the land is to be preserved for the remainderman or reversioner in fee. Timber, in the strict sense, has always been considered as part of the inheritance and to cut timber is waste, since it represents a taking away of capital.

Apart from statute there are two exceptions to this general principle. First, where trees are not timber and are not otherwise affected by the law of waste (as, for example, are trees planted for ornament or protection) the tenant for life may freely cut them and sell the wood and is entitled to keep the proceeds. Secondly, where in timber estates trees are periodically cut and replanted according to the ordinary course of husbandry, the proceeds of sale of the timber after paying the costs of cutting, replanting and refencing may be income. This is because the capital value of the land is first restored before any income is made available and the timber is therefore regarded as the periodical fruit of the soil in the same way as any other crop (*f*).

Whether the proceeds of sale of timber are income or capital

In the case of the tenant of a limited estate in land it will be seen that the question is primarily: income or capital? Apart

(*e*) [1891] 3 Ch. 306.
(*f*) *Honywood* v. *Honywood* (1871) L.R. 18 Eq. 306, at p. 310.

from statute, the tenant for life (*g*), is entitled to the whole net proceeds or none at all—the proceeds of sale are either income or capital. Before 1882 this was clearly the position : either the tenant for life was not impeachable (or had an express power to cut timber under the settlement) and could normally cut timber and pocket the proceeds; alternatively he was impeachable and had no express power to cut timber, in which case he was bound to go to the court for leave if he wished to do so.

If the tenant for life applied to the court for leave to cut timber (as indeed would be the case today if a tenant for life applied for leave (say) to cut ornamental timber which does not come within section 66 of the Settled Land Act, 1925), the terms upon which the court would grant leave would, normally, be that the proceeds of sale were invested; the tenant for life would thereafter be entitled to the income derived from the investment (*gg*). Since section 35 of the Settled Land Act, 1882 (now replaced by section 66 of the 1925 Act), a tenant for life impeachable for waste has a statutory power to cut timber ripe and fit for cutting, provided he obtains leave of the trustees of the settlement or of the court, subject only to the statutory condition that only one fourth of the proceeds goes to the tenant for life as income while the remaining three fourths must be put to capital.

It should be observed, however, that section 66 applies only within its particular limits and apart from the section the old rules remain; it is still true that capital is the property of the reversioner or remainderman and income is the property of the tenant for life. What the statute has done is to give the tenant for life power to cut and sell timber while providing that part of what would otherwise have been income arising as a result of the exercise of the power shall be paid into the capital fund.

Thus far we have dealt with the case of the tenant of an estate in land, for it is he to whom the doctrine of waste applies strictly. What then is the position of a beneficiary under a trust for sale? Under the usual formula he is entitled to be paid the rents and profits of the land until sale and thereafter (if he be a limited owner) to the income derived from the investment of the proceeds of sale. Both before and after sale the beneficiary's interest is personalty only, while the trustees hold the legal estate in fee simple with certain powers.

So far as the beneficiary is concerned, it has been shown above

(*g*) For the sake of brevity we refer hereafter to "tenant for life" only; but the points made will normally refer also to tenants for years except where the matter is dealt with by covenants.

(*gg*) *Cf. Wentworth* v. *Wentworth* [1900] A.C. 163 (J.C.).

that, if the doctrine of waste is to be relevant, any money received by the beneficiary must otherwise be income—that is to say, apart from the rules of waste a beneficiary would be entitled to pocket the money; but where those rules apply, and for that reason alone, such proceeds are required to be treated as capital. In the case of a trust for sale, however, the proceeds of sale of timber must nearly always be capital. Trustees for sale of a timber estate when they cut and sell the timber are realising the capital value of the land, and it is no less a realisation of capital because it is effected in two parts, the sale of the timber and the subsequent sale of the soil. If mines and minerals are sold outright by trustees for sale of the land containing those minerals, and there is subsequently a sale of the surface, the two sales are both effected under the same power and proceeds are capital in both cases. Accordingly, the beneficiary will be entitled to the income derived from the investment of the capital sums so arising and not to the proceeds themselves.

It is of course true that the effect is that there may in fact be no intermediate income pending cutting and sale. It would appear that under a trust for sale of timber, income (unaffected by any considerations of waste) can only arise pending sale in the following circumstances:

(1) Cases to which the rules in *Howe* v. *Earl of Dartmouth* (*h*) and *Re Earl of Chesterfield's Trusts* (*i*) apply;

(2) Where in a will or settlement the proceeds of sale of timber are expressly declared to be income;

(3) Where trustees cut and replant timber in the course of ordinary estate management;

(4) Where the fruits of the trees themselves can constitute income: "The testator may possibly have contemplated . . . that his widow's flocks might lie under the shade and that she might feed her swine upon the acorns and beech nuts if she chose to do so" (*k*). If there were a market for acorns the proceeds of their sale would be the true income pending cutting of the timber.

If this be not true and if the proceeds of sale of timber are to be regarded as income, trustees for sale of a timber estate must be trustees of the actual soil alone—a remarkable proposition seeing that the land is virtually worthless apart from the timber upon it. Such a proposition would give rise to even more difficult inquiries. Thus if trustees for sale sell with the timber standing there is no

(*h*) (1802) 7 Ves.Jun. 137.
(*i*) (1883) 24 Ch.D. 643.
(*k*) *Dashwood* v. *Magniac* [1891] 3 Ch. 306, *per* Bowen L.J., at p. 367.

doubt that this is a sale in exercise of the trust and all the proceeds of sale go to capital: *Re Llewellin* (*l*). Suppose then that the trustees fell the trees and then sell the land with the timber on the ground. Presumably the same rule would apply, even if the timber is sold to one person and the land itself to another. At what point, one may ask, does the sale of the timber cease to be effected in pursuance of the trust for sale?

It is submitted that the proper rule is that set out above: that the proceeds of sale of timber are to be regarded as capital in the same way as any other property sold in pursuance of a trust for sale. From this it must follow that the tenant for life's interest in the timber is limited to the income derived from the invested proceeds of sale and does not extend to the proceeds themselves.

Whether the doctrine of waste can apply to trusts for sale

We have noticed that the applicability of the doctrine of waste depends on the question whether (apart from the doctrine) the money derived from the sale of timber can be treated as income; we have also sought to show that the proceeds of sale of timber under a trust for sale can never be treated as income. This strictly concludes the matter, but it may be demonstrated that waste is inapplicable to the beneficial interests under a trust for sale, even if the proceeds of sale could be regarded as income.

The doctrine of waste is a doctrine applicable to tenants of limited estates in land. Originally it affected legal estates only but by an Act of 1433 it was applied to equitable estates for life or years also. The doctrine however never applied to estates of inheritance, the fee simple or the fee tail, and indeed Challis regarded as one of the important characteristics of the fee simple the right to commit unlimited waste. Nor did the doctrine ever apply to pure personalty (*m*). In the modern trust for sale the interest of the trustee is normally an estate in fee simple; the interest of the beneficiary is in the proceeds of sale and is personalty. Neither party has any interest to which the doctrine of waste can be or has ever been applied. On principle, at all events, the doctrine of waste seems inapplicable to trusts for sale.

It has, however, been assumed in the courts that the doctrine did so apply (*n*). Since 1925 such an assumption is based either

(*l*) (1887) 37 Ch.D. 317.

(*m*) References herein to "personalty" must be taken to exclude terms of years.

(*n*) *Re Ridge* (1886) 31 Ch.D. 504 (minerals). *Re Trevor-Batye's Settlement* [1912] 2 Ch. 339. In this case, however, the trees were not timber; but even if they had been, s. 35 of S. L. A., 1882, could have applied. Compare also *Re Harker's Will Trusts* [1938] Ch. 323.

on a supposed analogy with settlements under the Settled Land Act, or on an argument derived from the terms of section 28 of the Law of Property Act, 1925.

The analogy with the Settled Land Act settlement is derived from the supposition that (as was, indeed, the case before 1926) the trust for sale and the strict settlement are merely variations in the conveyancing machinery to be employed in creating a settlement, the substance remaining unchanged. However logically desirable it may be that this be the case, it is nevertheless the fact that these variations in machinery have practical consequences, the most important of which for present purposes is, that the corpus of the strict settlement is regarded as land even when its real form is money (*o*), while the corpus of a trust for sale is regarded as money even when it actually consists of land (*p*); and the doctrine of waste applies to land and not to personalty.

The second argument is based on the terms of section 28 (2) of the Law of Property Act, 1925. This subsection says: "Subject to any direction to the contrary in the disposition on trust for sale or in the settlement of the proceeds of sale, the net rents and profits of the land until sale, after keeping down costs of repairs and insurance and other outgoings, shall be paid or applied, *except so far as any part thereof may be liable to be set aside as capital money under the Settled Land Act, 1925*, in like manner as the income of investments representing the purchase-money would be payable or applicable if a sale had been made and the proceeds duly invested." In the Settled Land Act, 1925, the section affecting the cutting of timber is section 66, which runs as follows: "(1) Where a tenant for life is impeachable for waste in respect of timber and there is on the settled land timber ripe and fit for cutting, the tenant for life on obtaining the consent of the trustees of the settlement or an order of the court may cut and sell that timber or any part thereof.

"(2) Three fourth parts of the net proceeds of the sale shall be set aside as and be capital money arising under this Act and the other fourth part shall go as rents and profits."

Section 28 (1) of the Law of Property Act, 1925, confers upon trustees for sale of land the powers of a tenant for life and of the trustees of the settlement under the Settled Land Act, 1925.

The argument, then, appears to run as follows:

(1) Trustees for sale have the powers of a tenant for life (Law of Property Act, 1925, s. 28 (1)).

(*o*) S. L. A., 1925, s. 75 (5).
(*p*) *Cf. Re Kempthorne* [1930] 1 Ch. 268.

(2) The Law of Property Act, 1925, s. 28 (2), says that rents and profits arising pending the exercise of a trust for sale are paid subject to any sums required to be set aside by Settled Land Act as capital.

(3) The Settled Land Act, 1925, s. 66, requires a tenant for life who is impeachable for waste (and this is presumed unless he is expressed to be unimpeachable), to set aside three-quarters of proceeds of sale of timber as capital.

Hence:

(4) As the trustee has the powers of a tenant for life, when he cuts and sells timber he apportions one-quarter of the proceeds to income and three-quarters to capital.

(5) Therefore the doctrine of waste applies to trusts for sale.

The argument is however fallacious since in fact it assumes what it seeks to prove. It seeks to prove that the proceeds of sale of timber are *prima facie* income and that the doctrine of waste will apply so as to divert part of the income to capital. But in fact both these points are assumed since (1) if the proceeds of sale are capital, as we have sought to show above is the case, no apportionment can arise; whereas under the Settled Land Act the tenant for life will always get at least one-quarter of the proceeds as *income* even if impeachable; (2) unless the doctrine applies no apportionment is possible; and one cannot argue back from the apportionment so as to say that the doctrine of waste applies *because* the statute prescribes such apportionment.

Further defects may be pointed out, which demonstrate that in addition such an argument must be based upon a misconstruction of the terms of the sections relied upon.

(1) The Settled Land Act, 1925, s. 66, refers to a "tenant for life . . . impeachable for waste." The term "tenant for life" is defined in the Settled Land Act as including "a person (not being a statutory owner) who has the powers of a tenant for life under *this* Act [the Settled Land Act] and also . . . one of two or more persons who together constitute the tenant for life or have the powers of a tenant for life." There is nothing in this which can enable section 66 to apply to sales by trustees for sale, and the omission or exclusion of the statutory owner both from section 66 and the definition section fortify this (*q*), since the reference to "persons with the powers of a tenant for life" is restricted to the Settled Land Act and clearly means limited owners under section 20 of that Act.

(*q*) *Cf. Re Craven's S. E.* [1926] Ch. 985.

(2) The Law of Property Act, 1925, s. 28 (2) (above) says simply that, if the Settled Land Act requires an apportionment, such an apportionment is unaffected by the existence of a trust for sale within the framework of the settlement; it does not say that " where an act of trustees for sale would, if done by a limited owner, amount to an act of waste, then the provisions of (*inter alia*) section 66 of the Settled Land Act shall apply."

(3) Section 28 (2) is not in fact concerned with apportionments between capital and income, but is intended to ensure that intermediate income pending sale shall go to the ultimate beneficiary if no express disposition is made of such income.

(4) A trustee for sale of timber does not require to rely upon the Law of Property Act, 1925, s. 28 (1), and the Settled Land Act, 1925, s. 66; his power to sell is derived from the terms of his trust, which is quite independent of the statutory power. The section however gives a power to cut and sell timber to the tenant for life who is impeachable and has otherwise no such power, at the same time imposing terms upon him. It is significant that section 66 does not refer to a tenant for life who is not impeachable for waste, for he does not need the statutory power. Why then should the independent power of the trustee for sale be fettered by the statutory terms imposed upon *some* tenants for life?

Finally it may be noted that the doctrine of waste applies to acts of limited owners. In a trust for sale the tenant for life (who is, if anyone is, the person impeachable for waste) has no estate, no powers. If he is let into possession any acts performed by him are done in the name and on behalf of the trustees who are estate owners in fee simple, and improper acts of the trustees are redressible, no doubt, by proceedings for breach of trust, but not for waste.

Conclusion

It has been sought to show above that the doctrine of waste is inapplicable to trusts for sale, and that accordingly when trustees for sale cut and sell timber they do so by way of realisation in exercise of their trust and the money so arising is capital. It follows therefore that until cutting and sale and subsequent investment of the proceeds producing interest, the intermediate income is bound to be small if indeed there is any. The effect of this is therefore to put the tenant for life under a trust for sale in a substantially worse position than under a strict settlement; the latter will get

one-quarter of the proceeds of sale of cut timber in any case and he may get all if he be unimpeachable for waste, while the former merely knows that he can look forward to (say) an annual 4 per cent. on the net proceeds. This disparity can, however, be avoided by a declaration (if desired) in the settlement on trust for sale, to the effect that one-quarter of the net proceeds of sale of timber (or as the case may be) shall be deemed to be income and paid accordingly.

" RESCISSION "

By A. Bate, Solicitor

" Rescission " is a word much used (or abused) in conveyancing and one wonders how many conveyancers in practice have ever stopped to think what it really means.

Mr. H. W. R. Wade in [1954] *Cambridge Law Journal*, p. 89, remarked that conveyancing law had many imperfections and was far from clear, and that there are indeed astonishingly few decisions on the absolute fundamentals of title. Chitty J. in *Ashburner* v. *Sewell* [1891] 3 Ch. 405, at p. 410, said: " Cases on the law of vendor and purchaser are often extremely complex and require minute investigation; and although from some of them general principles may be evolved, they often result merely in the judge's opinion on the particular contract."

The object of this article is to try to clarify the " absolute fundamental " of one point badly needing clarification, namely the meaning of " rescission " particularly in conveyancing. As the writer's purpose in doing so has been to provide a short and simple and perhaps over-simplified basic rule, no detailed analysis of numerous and often irreconcilable cases has been attempted. In practice, as Chitty J. said above, the result in any particular case more often depends on the judge's opinion of the particular contract, but this article does point out a practice pitfall to be avoided.

An analysis of several cases on this subject in the *Law Journal* of April 9, 1948, at p. 199, concluded by remarking, " A reasonable explanation would be welcome." It is submitted that the explanation in this present article is at least reasonable. Perhaps some day some court will decide that it is also the correct one.

" Rescission " appears to have at least three fundamentally different meanings:—

1. Rescission in the strict sense means the setting aside of the contract in equity (in or out of court) for misrepresentation, duress or undue influence. In this sense the contract is *voidable* by the innocent party who is entitled to be restored to his former position *as if the contract had never been made*. This *restitutio ad integrum* includes an indemnity against his expenses of performing the contract while it lasted: *Whittington* v. *Seale-Hayne* (1900) 16 T.L.R. 181. But if the contract had never been made the

innocent party could not, and after rescission in this sense cannot, sue on it, neither for money payable under it nor for damages for its breach (*Barber* v. *Wolfe* [1945] Ch. 187); there is nothing to enforce, the contract is gone *in toto* (*Thorpe* v. *Fasey* [1949] Ch. 649), unless, of course, there is any other cause of action, *e.g.*, damages for the tort of deceit or fraudulent misrepresentation.

If the innocent party can and does rescind in this first sense, the whole contract goes, including any special conditions that misrepresentations, errors or omissions shall not annul the sale nor entitle the purchaser to compensation.

Being an equitable remedy in this sense, it is subject to the usual equitable principles and defences.

2. Rescission is, however, also often used as meaning the discharge at common law of the innocent party by the other's breach of the contract. If the vendor cannot, or will not, make a good title, convey and complete, the purchaser cannot complete and is discharged from his obligations under the contract but does not lose his rights or remedies for the breach. In rescission in this sense, the contract is *valid* (not voidable), and the injured party is entitled to damages to put him financially in the position in which he would have been *had the contract been carried out and completed.*

The innocent party is thus discharged from all his obligations including any special conditions that errors shall not annul the sale but shall be the subject of compensation. *A fortiori* if the contract also excludes compensation: *Jacobs* v. *Revell* [1900] 2 Ch. 858.

Whether the word " rescission " is correctly used in this secondary sense is doubtful. *Snell* (24th ed.), p. 563, distinguishes such a discharge by breach and rescission. But, rightly or wrongly, the word is frequently used in this secondary sense in textbooks (*e.g.*, Snell, pp. 566, 567), by the court itself (*e.g.*, in *Barber* v. *Wolfe*, which is dealt with below), and even in a statute (*e.g.*, Sale of Goods Act, 1893, s. 48 (4)), although this may possibly be an example of the third meaning below.

3. Rescission by agreement.

(1) The parties may agree to rescind or cancel an existing contract on any terms agreed, or

(2) They may, in a contract, agree that, if a certain event happens, the contract shall be rescinded or cancelled on terms, *e.g.*,:—

(a) If the purchaser presses a requisition, the vendor may rescind on stated terms as to costs, return of deposit and abstract.

(b) If the purchaser fails to complete, the vendor may resell on agreed terms as to the measure of damages.

In this last sense the original contract was, and remains, valid (not voidable) and is not discharged by breach but, in the specified event, it is carried out in an agreed alternative method of performance under one of its original terms (like an "escape clause").

The word may also be used even more loosely in other senses. *Snell*, at p. 572, says "but if there is no real contract owing to mistake preventing any real *assensus ad idem*, the remedy should be rescission," a use of the word that appears to fit none of the above three meanings.

This confusion caused by the use of "rescission" with widely differing meanings having opposite results not only makes the law unnecessarily difficult for students to understand but has also led to unfortunate results in practice.

In many cases, *e.g.*, where the purchaser "rescinds" because the vendor has failed to disclose a defect in title or incumbrance or to deduce a good title, it is usually immaterial in which sense (the first or second) the purchaser is entitled to, and does, rescind. There appears to be little, if any, difference between the *restitutio* which the purchaser gets in equity on rescission in the first sense, *i.e.*, the return of his deposit, costs, and the other expenses of performing the contract while it lasted, and the limited damages which the purchaser will get on rescission in the second sense, measured, as they are in such a case, by the Rule in *Bain* v. *Fothergill*, which seem to amount to about the same.

It may be for this reason that "rescission" is so often used indifferently without harm. The result is the same either way. There have, however, been cases where the use or misuse of the word has had harmful results.

In *Barber* v. *Wolfe* (*supra*), the purchaser, being in possession, agreed to pay interest until completion, but failed to complete. The vendor sued him, and obtained an order for specific performance or, in default, "rescission," forfeiture of deposit and delivery up of possession. The purchaser lived in the house "rent free" from contract until he failed to comply with the order for specific performance and vacated over a year later. The vendor then applied for a further order for interest under the contract or mesne profits, as damages for breach of contract, for the period the purchaser was in possession. Romer J. however held that the contract having been rescinded, the contract was gone, and nothing could be recovered under its terms or as damages for its breach.

This result appears to have been caused by confusing the first

and second meanings of " rescission." The vendor and the court in its first order probably used it in its second sense (it would not appear to have been applicable in the first sense), but the court on the second application treated it as having the consequences of rescission construed in its strict first meaning. Had the vendor sued for specific performance, or in default, a declaration that the vendor's obligations were discharged by the purchaser's breach, and damages for that breach, it is difficult to see why he should not have succeeded.

In *Harold Wood Brick Co.* v. *Ferris* [1935] 2 K.B. 198 the vendor fared better. The contract provided that, on default by the purchaser in completing, the vendor could " rescind the sale " to the purchaser and resell to another purchaser. This the vendor did at a loss and sued for the loss as unliquidated damages for breach of the contract. Despite the purchaser's defence that damages could never be recovered after rescission, the Court of Appeal upheld the claim for damages because on the facts it was held that the vendor had rescinded in the second and not the first sense. Had the contract provided, as is usual, that any loss on the resale should be recoverable as liquidated damages, the word " rescind " would then have been used in the third sense (rescission by agreement on the terms agreed). In reserving or exercising such a power of resale, however, it is safer not to use the word " rescind " at all and thus avoid the possibility of the defence raised in the *Harold Wood Brick Co.* case.

The moral of these cases is not to use the word " rescind " except in its first strict sense lest it be misconstrued as having been used in that sense and all rights under the contract be lost.

Certainly its use in its second sense (*e.g.*, in a notice making time of the essence) can easily be avoided by saying that " on failure to complete, the vendor's obligations will be treated as having been discharged by the purchaser's breach." The unfortunate results in *Barber* v. *Wolfe* might similarly have been avoided by asking for the declaration suggested above instead of rescission.

In its third sense, *e.g.*, in a vendor's notice of intended resale under the usual condition permitting resale, the vendor need only say that " on the purchaser's default, the vendor will resell under the condition," without using the word " rescind " at all. Under the usual condition permitting the vendor to " rescind " on agreed terms (third sense) if the purchaser presses a requisition, it is not so easy to avoid the word or find a substitute but this practice and its consequences are so well known that, if the condition is expressly referred to in the vendor's notice to rescind thereunder, there appears to be little or no risk of misconstruction.

Incidentally, the word "repudiate" is equally ambiguous and confusing. It may mean:—

(1) Rightful repudiation, *e.g.*, a lawful denial of liability or rescission, which may be in either the first or second sense with differing results, or

(2) Wrongful repudiation, *e.g.*, by a wrongful denial of liability or an anticipatory breach, in either case being a common law breach of contract.

THE INTERPRETATION OF COMMON REPAIRING TERMS

By W. A. West, LL.B., Barrister-at-Law

"If there be any doubt upon the sense of the words, such construction is to be made as is most strong against the covenantor, lest by the obscure wording of his contract he should find means to evade and elude it": Bac. Abr. *tit.* Covenant F.

"Everyone knows what such a covenant means, and the tenant must fulfil it according to the nature of the premises": Tindal C.J. in *Mantz* v. *Goring* (1838) 4 Bing. N.C. 451.

The interpretation of common repairing terms is nowadays neither as easy nor as robust as was at one time the case. It is proposed to discuss in this article the trend of the modern decisions in dilapidation cases with a view to assisting the conveyancing practitioner. The prodigious repairing covenants of Victorian leases are no longer with us, but no one knows better than the practising conveyancer that the drafting of repairing covenants is more than a mere matter of extracting forms from legal treatises and that the art of adapting precedents to meet the requirements of particular cases is one which demands considerable learning and subtlety for its proper execution.

Covenants are construed by the courts in the light of the intention which the parties are to be taken to have had from the words which they have used. The general modern rule of construction is to apply the words found in the relevant document as strictly as possible to the circumstances of the case, and to give each word (*a*) its natural ordinary meaning, unless the context shows that the meaning which would result is different from the meaning intended by the parties, or unless there is some consequent inconsistency which cannot be attributed to the parties (*b*). Words are not necessarily to be given their strict literal meaning: it is the "good sense of the agreement" (*c*) which has to be ascertained. It must be borne in mind that every covenant is construed individually, and that each case merely decides the interpretation of a particular covenant in particular circumstances without laying

(*a*) *Cf.* remarks of Fletcher Moulton L.J. in *Lurcott* v. *Wakely and Wheeler* [1911] 1 K.B. 905.
(*b*) *Grey* v. *Pearson* (1857) 6 H.L.C. 61, 78.
(*c*) *Per* Tyndal C.J. in *White* v. *Nicholson* (1842) 4 Man. & G. 95, 98.

down that certain words must always be construed in the same sense. Decisions must not, therefore, be applied blindly to the facts of another case even when the expressions used are the same or have been held to have the same meaning, for the circumstances may not warrant the same construction (*d*). In this connection the age, class and locality of the premises concerned and their general condition at the time of the demise will normally be relevant (*e*).

Where, however, a close parallel can be drawn between the facts and circumstances of particular cases, the views expressed by the court with regard to similar words in the earlier decision will naturally be of great importance.

Repairing covenants are to be "reasonably" construed (*f*). This rule is sometimes stated as follows, that a covenant to repair is satisfied if the lessee keeps the premises in substantial repair: the classic illustration is that a tenant who puts nails into the walls and neglects to fill up the holes at the end of the tenancy does not commit a breach of covenant (*g*). In the same way, even a bulge in a wall does not necessarily amount to a dilapidation provided it is sufficiently slight. The question is one of degree in each case, and depends on such considerations as the age and nature of the premises, the possibility of further bulging or subsidence, the effect which the bulge has on the comfort of the inhabitants and the condition of other parts of the premises, *e.g.*, doors and windows.

It will be convenient to note here that covenants by landlords to repair are *interpreted* in the same way as those given by tenants (*h*). They are, of course, subject to certain different rules, notably that no obligation in general arises until the landlord has notice of a defect on the demised premises.

General Repairing Covenant

The following simple form of general repairing covenant is taken from Prideaux's *Precedents in Conveyancing*:—

"At all times during the said term to keep the premises including all fixtures and additions thereto in good and substantial repair and condition and deliver up the same in such good and substantial

(*d*) *Per* Atkin L.J. in *Calthorpe* v. *McOscar* [1924] 1 K.B. 716, 731. *Cf. Walker* v. *Hatton* (1842) 10 M. & W. 249.

(*e*) *Payne* v. *Haine* (1847) 16 M. & W. 541; *Calthorpe* v. *McOscar*, *supra*.

(*f*) *Mantz* v. *Goring* (1838) 4 Bing. N.C. 451, *per* Tyndal C.J.

(*g*) *Perry* v. *Chotzner* (1893) 9 T.L.R. 488, and see *Harris* v. *Jones* (1832) 1 Mood. & R. 173.

(*h*) *Torrens* v. *Walker* [1906] 2 Ch. 166; *Pembery* v. *Lamdin* [1940] 2 All E.R. 434.

repair and condition to the lesser at the expiration or sooner determination of the said term."

It will be convenient to discuss separately certain features of this type of covenant.

1. "*Put, keep and leave in repair*"

A general covenant to repair may impose on a tenant any one or more of the following obligations: to put into repair; to keep in repair; and to leave in repair. It is not uncommon for the same covenant or lease to contain all three obligations, either expressly or impliedly, but it will be best to consider them one by one.

A term that a tenant shall *put* premises into repair is not commonly found, since such an obligation is implied in a covenant to repair or keep in repair, but it is sometimes inserted when premises are let in a dilapidated condition so that the parties' intention may be expressly set out. An undertaking to put into repair imposes upon a tenant, at the commencement of the term, an obligation to carry out all work necessary to make the premises fit for the purpose for which they are let. What the tenant must do depends upon the condition of the premises at the commencement of the term in relation to their type or class and the purpose of the letting. If a tenant takes for habitable occupation an old house in ruinous condition he is bound under a covenant of the kind mentioned to make the house habitable, notwithstanding that this may involve him in considerable expense. In the case of a dwelling-house the standard of habitable repair into which the tenant must put the premises will depend on the class of tenant likely to inhabit them (*i*).

The decision in *Roberts* v. *Brett* (1865) (*k*) affords an example of the application of the principles of construction briefly discussed above. In that case it was held that a covenant to put premises into repair "forthwith" must be construed reasonably, and that it is for a jury to say upon the evidence whether a defendant has done what he reasonably ought to have done to fulfil his obligation. In an earlier case (*l*) it was pointed out that the word "forthwith" does not mean "immediate," and that to hold that it did would be contrary to common sense, for a certain amount of time must be allowed from the nature of things for performance of the covenant.

An undertaking by a tenant to *keep* demised premises in repair generally appears both in building and in occupation leases. The obligation cannot, if the premises are out of repair, be fulfilled

(*i*) *Belcher* v. *McIntosh* (1837) 2 Mood. & R. 186.
(*k*) 11 H.L.C. 337.
(*l*) *Doe* d. *Pittman* v. *Sutton* (1841) 9 C. & P. 706.

unless the tenant first puts them into repair: it is a common error to suppose that a covenant to keep in repair involves merely the maintenance of the premises in whatever dilapidated condition they were in at the commencement of the demise (*m*). Further, keeping in repair involves leaving (or delivering up) in repair. An undertaking to keep in repair creates a continuing obligation which is in force during the whole of the letting, from beginning to end, and if at any time during this period the premises are in disrepair the tenant is liable for breach of covenant (*n*).

In spite of the fact that an obligation to leave and deliver up premises in repair at the end of a tenancy is to be implied from an undertaking to keep them in repair, it is quite usual for a tenant expressly to undertake this obligation. No doubt landlords prefer to have the liability clearly set out, in view of the importance which they naturally attach to the state of their property at the determination of a lease. If, as often happens in short leases, a tenant undertakes to leave premises in repair, but enters into no agreement about repair during the term, the landlord has no claim until the end of the tenancy. A common form is the following:—

"The tenant agrees to deliver up at the expiration or sooner determination of the said term the messuage with all fixtures attached thereto in as good repair and condition as it now is in (reasonable wear and tear and damage by fire excepted)."

The "fair wear and tear" exception is dealt with later in this article.

2. "*Fixtures and Additions*"

General covenants to repair usually refer to "the premises including all fixtures and additions thereto." In all cases, as has been emphasised above, the actual words used in a covenant must be considered in relation to the relevant circumstances, but it may nevertheless be said that a general covenant to repair will extend (even without express words) to all buildings erected during the term and to all fixtures which may be added to buildings or land and which the tenant has no right to remove. The cases (*o*) show a distinction relating to liability to repair buildings erected on land after the grant of a lease, and this is well explained by Bigham

(*m*) *Proudfoot* v. *Hart* (1890) 25 Q.B.D. 42; *Payne* v. *Haine* (1847) 16 M. & W. 541.

(*n*) *Luxmore* v. *Robson* (1818) 1 B. & Ald. 584. See also cases cited in note (*m*), *supra*.

(*o*) *Cf. Dowse* v. *Cale* (1690) 2 Vent. 126; *sub nom. Dowse* v. *Earle*, 3 Lev. 264; *Field* v. *Curnick* [1926] 2 K.B. 374; *Doe* d. *Worcester School Trustees* v. *Rowlands* (1841) 9 C. & P. 734.

J. in *Smith* v. *Mills* (1899) (*p*), as follows: "As to the authorities that had been cited the rule laid down in them was that where there was a general covenant to repair that must refer both to buildings erected at the date of and subsequent to the demise; but when the covenant to repair in its terms applied to certain specified buildings it must not be extended beyond those buildings."

3. *Obligation Not to Destroy*

Leases commonly contain covenants against alterations. The interpretation of terms of the kind is a matter outside the scope of this article, but an interesting question exists to what extent a general repairing covenant involves an implied obligation not to make alterations. It is clear that a covenant to repair constitutes, from one point of view, a covenant not to destroy the demised premises, and that to pull down the premises or part of them is prima facie a breach (*q*). Nevertheless, every covenant must be construed in the light of the parties' intentions at the time when the lease was created, and if alterations were then expressly or impliedly contemplated as permissible the consequent destruction of some minor part of the premises will not necessarily be a breach of a repairing covenant. In *Hyman* v. *Rose* (*r*), which is perhaps the *locus classicus* of the topic, a lease of a chapel and adjoining ground for approximately ninety years contained a covenant by the lessee to repair, maintain and keep the chapel and the walls, fences and other appurtenances in good and substantial repair. Assignees opened a new doorway and moved staircases for the purpose of converting the chapel into a cinema. The House of Lords held that since user as a cinema was not prohibited by the lease the alterations constituted neither waste nor breach of covenant.

It may be appropriate here to mention that a tenant who has entered into a general covenant to repair will be liable to rebuild the entire premises if they are destroyed by his act or neglect or by fire or other accident (*s*) unless he is excused by express provision in the lease (*t*).

4. *Verbal Distinctions in General Covenants*

The phrase "keep . . . in good and substantial repair and condition" has many variants. "Well and sufficiently repair,"

(*p*) 16 T.L.R. 59.
(*q*) *Gange* v. *Lockwood* (1860) 2 F. & F. 115. See also *Doe* d. *Wetherell* v. *Bird* (1833) 6 C. & P. 195; *Doe* d. *Vickery* v. *Jackson* (1817) 2 Stark 293.
(*r*) [1912] A.C. 623.
(*s*) *Bullock* v. *Dommitt* (1796) 2 Chit. 608.
(*t*) Or by statute, as in the case of war damage.

"keep in good tenantable repair," "substantially and effectually repair" are examples of phrases which are commonly included in general covenants. The noun "repair" itself may be qualified in a number of ways, and adjectives such as "good," "habitable," "necessary," "needful," "substantial," and "sufficient" are often attached to it. Whether any of the phrases mentioned adds anything to the mere verb or noun "repair" is a matter for doubt.

"It is difficult," said Alderson B. in *Belcher* v. *M'Intosh* (*u*), "to suggest any material difference between the term 'habitable repair' . . . and the more common expression 'tenantable repair'; they must both import such a state as to repair that the premises might be used and dwelt in not only with safety, but with reasonable comfort, by the class of persons by whom, and for the sort of purposes for which, they were to be occupied." In *Payne* v. *Haine* (*a*) Parke B. considered that "good" and "tenantable" repair meant the same thing. In *Calthorpe* v. *McOscar* (*b*) a general covenant was worded "well and sufficiently to repair, support, uphold, maintain . . . and keep the said houses . . ." Bankes L.J. said (*c*) "I attach no importance to the particular form of words used in the covenant. The effect is the same in my opinion, whatever words the parties used provided that they plainly expressed the intention that the premises are to be repaired . . ."

In the same case, Scrutton L.J. said (*d*): "In my view the matter can be dealt with as if the covenant were one 'to keep and yield up at the end of the term in repair.' I do not think there is any substantial difference in construction between 'repair,' which must mean 'repair reasonably and properly,' and 'keep in good repair' or 'sufficient repair' or 'tenantable repair.'"

Atkin L.J. however, expressed (*e*) rather a different view: "I see no reason for construing the words of covenants in leases dealing with obligations to repair in any other way than one would construe any other covenant. Effect should be given if possible to every word used by the parties. It does not appear to me useful to refer to such covenants as the usual covenants to repair, or general repairing covenants, and then consider only what is the meaning of 'repair.' It appears to me still less useful to take a number of terms which may be found in different leases, treat

(*u*) (1839) 2 Mood. & R. 186.
(*a*) (1847) 16 M. & W. 541.
(*b*) [1924] 1 K.B. 716.
(*c*) At p. 722.
(*d*) At p. 729.
(*e*) At p. 731.

them as all synonymous, and to impute to all of them a special meaning attached by authority to one of them."

It might be submitted that Atkin L.J.'s view is theoretically sound, but there are obvious practical difficulties in applying it. Although it is not inconceivable that the standard of repair might be affected by the use of some special or unusual adjective, such as "perfect" or "ideal," it seems that the weight of judicial authority in *Calthorpe's* case has tipped the scale in favour of a more down-to-earth approach.

"Repair"

If the approach indicated by Bankes and Scrutton L.JJ. in *Calthorpe's* case be the correct one, the exact meaning of the word "repair" itself as used in various types of covenant is the most important and fundamental problem in this field of law. The decisions fall conveniently into two classes, which can best be considered separately.

1. "*Repair*" *and* "*Renewal*"

The first group of cases to which reference should be made concerns the extent to which a covenant to repair includes an obligation to renew the demised premises. The older cases on this topic should be treated with caution: one of them, *Gutteridge* v. *Munyard* (1834) (*f*) contains a judgment of Tindal C.J. which is still of great interest but must be read in the light of the later cases, particularly *Lurcott* v. *Wakely and Wheeler* (*g*). Two dicta from this case are of some importance.

"The word 'repair,'" said Fletcher Moulton L.J. (*h*) "refers to an operation to which the defendants [the tenants] bind themselves to have recourse. For my own part, when the word 'repair' is applied to a complex matter like a house, I have no doubt that the repair includes the replacement of parts. Of course, if a house had tumbled down or was down the word 'repair' could not be used to cover rebuilding."

Buckley L.J. said (*i*): "Repair and renew are not words expressive of clear contrast. Repair always involves renewal; renewal of a part; of a subordinate part. A sky light leaks; repair is

(*f*) 1 Moo. & R. 334; 7 C. & P. 129 (Cozens-Hardy M.R. pointed out during the argument in *Lurcott* v. *Wakely and Wheeler* [1911] 1 K.B. 905 that a "remarkable discrepancy" existed between these two reports, and referred to "materially different" language in the report in 7 Carrington & Payne).

(*g*) [1911] 1 K.B. 905.

(*h*) At p. 918.

(*i*) At p. 923.

effected by hacking out the putties, putting in new ones and renewing paint. A roof falls out of repair; the necessary work is to replace the decayed timbers by sound wood; to substitute sound tiles or slates for those which are cracked, broken or missing; to make good the flashings, and the like. Part of a garden wall tumbles down; repair is effected by building it up again with new mortar, and, so far as necessary, new bricks or stone. Repair is restoration by renewal or replacement of subsidiary parts of a whole. Renewal as distinguished from repair, is reconstruction of the entirety, meaning by the entirety, not necessarily the whole, but substantially the whole subject-matter under discussion."

In the later case of *Calthorpe* v. *McOscar* (*k*), these dicta were referred to with approval, and Atkin L.J. said: "'Repair' . . . connotes the idea of making good damage, so as to leave the subject as far as possible as though it had not been damaged. It involves renewal of subsidiary parts; it does not involve the renewal of the whole. Time must be taken into account; an old article is not to be made new; but so far as repair can make good, or protect against the ravages of time and the elements it must be undertaken."

The principles suggested by these dicta are endorsed and illustrated by three important decisions.

(1) *Lister* v. *Lane and Nesham* (*l*). In this case a seven years' lease contained a covenant by the tenants that they would " when and where and as often as occasion [should] require well sufficiently and substantially repair, uphold, maintain . . . and keep " the demised premises, together with a term to yield up in the required condition. The house concerned was at least one hundred years old, perhaps much older, and before the lease came to an end one of its walls bulged outwards. The landlord served a notice requiring repairs under the covenant, and these the tenants executed, except that they failed to repair the bulged wall: it was found that it would have been impossible to do this without demolishing and rebuilding the whole house, because the foundations consisted of a timber sill resting on damp soil, and the sill had decayed and allowed the house to subside. It would, in fact, have been necessary to underpin with concrete or brickwork resting on a layer of gravel seventeen feet down in the mud. After the lease expired, the district surveyor condemned the house as a dangerous structure and it was demolished. The landlord claimed the cost of replacement from the tenants as damages for breach of the covenant to

(*k*) [1924] 1 K.B. 716.
(*l*) [1893] 2 Q.B. 212.

repair. The Court of Appeal upheld the judgment given at first instance for the tenants. "If," said Lord Esher M.R. "a tenant takes a house which is of such a kind that by its own inherent nature it will in course of time fall into a particular condition, the effects of that result are not within the tenant's covenant to repair. However large the words of a covenant may be, a covenant to repair a house is not a covenant to give a different thing from that which the tenant took when he entered into the covenant. He has to repair that thing which he took; he is not obliged to make a new and different thing, and moreover, the result of the nature and condition of the house itself, the result of time on that condition, is not a breach of the covenant to repair."

Kay L.J., agreeing, added: "The only way to repair (the house) is by this underpinning. That would not be either repairing, or upholding, or maintaining such a house as this was when the lessee took it, and he is not liable under his covenant for damage which accrued from such a radical defect in the original structure."

(2) *Lurcott* v. *Wakely and Wheeler* (*m*). Tenants covenanted "well and substantially to repair and keep in thorough repair and good condition" the demised premises, and to yield up in the required state. Shortly before the determination of the lease, the local authority served a dangerous structure notice on the owners and occupiers requiring the front external wall of the house to be demolished. The wall, which was over two hundred years old, was in such a bad state as a result of time, wind and weather that it could not be patched up. The landlord, in compliance with the notice, rebuilt the wall with concrete foundations, footings and a damp-course, so as to meet the requirements imposed under statutory powers by the local authority. He then sued the tenants for the cost, and was successful at first instance, before the Divisional Court, and in the Court of Appeal. Cozens-Hardy M.R. said that the portion of wall concerned was merely a subsidiary part of the demised premises. The replacement of the wall did not change the character or nature of the building, and he could not see that the case was any different from one in which, say, by reason of the action of the elements and the lapse of time, rafters in a roof had become rotten and a corner of the roof had given way, letting in water: in such a case the tenant would clearly be liable under his covenant. Fletcher Moulton L.J. said: "We must bear in mind that while the age and nature of the building can qualify the meaning of the covenant, they can never relieve the lessee from his obligation. If he chooses to undertake to keep in good condition an

(*m*) [1911] 1 K.B. 905.

old house, he is bound to do so whatever be the means necessary for him to employ in so doing. He can never say, 'The house was old, so old that it relieved me from my covenant to keep it in good condition.' If it was so old that to keep it in good condition would require replacement of part after part, until the whole was replaced—if that was necessary—then, by entering into a covenant that he would do it, he took on his own back the burden of doing it with all that this duty might entail." Commenting on the decision of *Lister* v. *Lane and Nesham*, *supra*, the learned Lord Justice said: "[That case] certainly contains nothing which says a covenantor is in any way relieved from the burden of his covenant, because it may be that in order to fulfil it he will have, to a certain extent, to rebuild the premises." (*n*)

(3) *Sotheby* v. *Grundy* (*o*). This is a modern case at first instance which throws some light upon the limits of the dicta in *Lister's* case, *supra*. A lease of a newly built house was granted in 1861 for 99 years and contained a covenant by the lessee to "repair, uphold, support, maintain . . . the premises . . . with all the necessary reparations and amendment whatsoever." By 1944 the walls were bulged, fractured and overhanging, and the London County Council exercised their powers under the London Building Acts to demolish the house as a dangerous structure. The landlord sued the tenant for the amount paid to the County Council as expenses of demolition. It appeared that the main walls, contrary to a Building Act of 1855, had been built either without any or upon defective footings, and that for this reason and also because of the nature of the site what had happened was almost certainly due to settling of the foundations. Lynskey J. gave judgment for the defendant, and referred to Lord Esher M.R.'s remarks in *Lister's* case, *supra*, concerning inherent defects. The question had been raised in the case before him (Lynskey J.) whether the building was one which, by its own inherent nature, would in the course of time fall into a particular condition. "I am sure that that is so," the learned judge continued, "but the matter does not end there, because, in view of some of the older authorities to which I have been referred, particularly *Calthorpe* v. *McOscar* (*p*), it seems to me that it must be a question of degree in each case. It may be that the inherent nature of a building may result in its partial collapse.

(*n*) The principle of *Lurcott's* case has been to some extent mitigated in cases on special (and very difficult) facts: see *Wright* v. *Lawson* (1903) 19 T.L.R. 510; *Parkes Drug Stores* v. *Edwards* (1923) unreported but cited in Adkin on *Dilapidations*, 4th ed., p. 81, from the *Journal of the Surveyors' Institution*.

(*o*) [1947] 2 All E.R. 761.

(*p*) [1924] 1 K.B. 716.

One can visualise the floor of a building collapsing, owing to defective joists having been put in. I do not think *Lister* v. *Lane* would be applicable to such a case. In those circumstances, in my opinion, the damage would fall within the ambit of the covenant to repair, but, as I say, it must be a question of degree in each particular case. I am told here by the two witnesses, whose evidence I accept, that the only way in which what happened could have been prevented would have been by underpinning. It is suggested that if fifteen years ago, when bulging was noticed, the tenant had underpinned, he would have been able to prevent further deterioration taking place. I am told that that would have meant shoring up the premises, the removal of existing foundations, such as they were, stage by stage, and the putting in of a new foundation in the way of footings and concrete to make the building safe. That, in my view, would, in effect, be asking the tenant to give the leasehold something different in kind from what had been demised. The premises demised here were premises with insecure foundations. What the tenant would have had to do would be to put in a new foundation which would alter the nature and extent of the property demised, turning a building which, as originally constructed, would not last more than some eighty-odd years into a building that would last for probably another hundred years . . . The expenses claimed were incorrect because of the inherent nature of the defect in the premises and do not come within the terms of the covenant contained in the lease."

A possible analysis of the cases is this. Prima facie, a tenant who has covenanted to repair must cure defects in the property concerned, and he cannot avoid this liability merely by saying "This wall or timber or roof is old and was old (or defective) at the time of the demise." But, although he is obliged to replace subsidiary parts, there is no obligation to replace the whole where the whole is worn out due to inherent defect. So far as the natural life of the house is capable of calculation, the tenant's obligation is only to enable its span to be reached. Old premises are not to be made new. The question whether a part is subsidiary or not is one of degree in each case.

2. *The Standard of Repair*

The amount and quality of the work which a tenant may be called upon to carry out in compliance with his repairing covenant will vary, as was briefly indicated at the beginning of this article, not only with the terms of the covenant but also with the facts and circumstances of the tenancy. Assuming that a covenant

exists which is ordinary in form, decisions in past cases based on exactly similar terms should not be blindly cited and applied, for the character, age, locality and class of the premises will normally be relevant in any dispute over dilapidations (*q*). If a new house in Kensington and an old house in Brixton are in an equally dilapidated state the tenant of the former has a greater liability than the tenant of the latter, although the wording of the covenant be the same in each case.

Covenants to repair must be reasonably construed. The same nicety of repair is not exacted for an old building as for a new one (*per* Tindal C.J. in *Mantz* v. *Goring* (*r*)). Substantial compliance with a covenant to repair is enough (see *Harris* v. *Jones* (*s*)). The standard required depends upon the age and nature of the premises (see *Proudfoot* v. *Hart* (*t*) and *Lurcott* v. *Wakely and Wheeler* (*u*). Time must be taken into account; an old article is not to be made new (see *Calthorpe* v. *McOscar* (*a*)). A distinction must be drawn, however, between the lease of premises which are new and those which are already old at the date of demise; the standard of repair required has reference to the condition of the premises at the date of demise. Nevertheless, although a house which was new at the date of demise must clearly be handed over in a better condition than a house which was then already old, the lessor cannot expect to have even a house new at the date of demise handed over in a new condition many years later. The question seems to be one of degree in each case.

These propositions may conveniently be illustrated by reference to the well-known case of *Proudfoot* v. *Hart* (*b*), which is of particular interest as being one of the few decisions in which a definite construction of a simple repairing term has been given. A house in Kentish Town, London, was let under an agreement for a three years' tenancy, the tenant undertaking "to keep the said premises in good tenantable repair and so leave the same at the expiration thereof." The landlord claimed, and the Official Referee awarded, the cost incurred after the termination of the tenancy in executing the following repairs: repapering walls where the paper on them at the beginning of the tenancy had worn out; repainting internal woodwork where the paint which was present at the beginning of the tenancy had worn off; white-washing and

(*q*) *Payne* v. *Haine* (1847) 16 M. & W. 541; *Proudfoot* v. *Hart* (1890) 25 Q.B.D. 42. *infra*; *Calthorpe* v. *McOscar* [1924] 1 K.B. 716, *infra*.
(*r*) (1836) 4 Bing. N.C. 451.
(*s*) (1832) 1 Mood. & R. 173.
(*t*) (1890) 25 Q.B.D. 42, *per* Lord Esher M.R.
(*u*) [1911] 1 K.B. 905, *per* Fletcher Moulton L.J.
(*a*) [1924] 1 K.B. 716, *per* Atkin L.J.
(*b*) (1890) 25 Q.B.D. 42.

cleaning the staircase and ceilings; and replacing with a new floor an old floor which was in existence when the tenancy commenced.

The tenant appealed against the Official Referee's award, contending that he had been improperly charged with what were merely decorative repairs. The Court of Appeal remitted the case for reconsideration. "The result of the cases," said Esher M.R. (*c*), "seems to be this: the question whether the house was, or was not, in tenantable repair when the tenancy began is immaterial; but the age of the house is very material with respect to the obligation both to keep and leave it in tenantable repair. It is obvious that the obligation is very different when the house is fifty years older than it was when the tenancy began . . . 'Good tenantable repair' is such repair as, having regard to the age, character and locality of the house, would make it reasonably fit for the occupation of a reasonably minded tenant of the class who would be likely to take it (*d*). The age of the house must be taken into account, because nobody could reasonably expect that a house two hundred years old should be in the same condition of repair as a house lately built; the character of the house must be taken into account, because the same class of repairs as would be necessary to a palace would be wholly unnecessary to a cottage; and the locality of the house must be taken into account, because the state of repair necessary for a house in Grosvenor Square would be wholly different from the state of repair necessary for a house in Spitalfields. The house need not be put into the same condition as when the tenant took it; it need not be put into perfect repair; it need only be put into such a state of repair as renders it reasonably fit for the occupation of a reasonably minded tenant of the class who would be likely to take it."

Later in his judgment, the Master of the Rolls dealt with the practical points raised in the case. "I will add a few words," he continued, "as to the way in which the definition should be worked out in the present case. The Official Referee appears to have said that in his view 'tenantable repair' included painting, papering and decorating. If he meant, as I think he must have meant, that it included *all* papering, painting and decoration, I have no hesitation in saying that his construction of the term 'tenantable repair' was wrong. Again, he has said that the tenant's obligation is to 'repaper with similar paper to that which was on the walls before, and repaint with similar paint to that which was on the painted portion of the premises before.' I think that view was wrong also."

(*c*) At p. 52.
(*d*) Definition drawn up by Lopes L.J. and concurred in by Esher M.R.

Expressing his view of the tenant's liability as to papering, Lord Esher said: "I agree he is not bound to repaper simply because the old paper has become worn out, but I do not agree with the view that under a covenant to keep a house in tenantable repair the tenant can never be required to put up a new paper. Take a house in Grosvenor Square. If when the tenancy ends, the paper on the walls is merely in a worse condition than when the tenant went in, I think the mere fact of its being in a worse condition does not impose upon the tenant any obligation to repaper under the covenant, if it is in such a condition that a reasonably minded tenant of the class who take houses in Grosvenor Square would not think the house unfit for his occupation. But suppose that the damp has caused the paper to peel off the walls, and it is lying upon the floor, so that such a tenant would think it a disgrace, I should say then that the tenant was bound, under his covenant to leave the premises in tenantable repair, to put up new paper. He need not put up paper of a similar kind—which I take to mean of equal value—to the paper which was on the walls when the tenancy began. He need not put up a paper of a richer character than would satisfy a reasonable man within the definition."

The obligation to repaint (or whitewash) was of the same character. "If the paint is in such a state that the woodwork will decay unless it is repainted, it is obvious that the tenant must repaint. But I think that his obligation goes further than that. A house in Spitalfields is never painted in the same way as one in Grosvenor Square. If the tenant leaves a house in Grosvenor Square with painting only good enough for a house in Spitalfields, he has not discharged his obligation. He must paint in such a way as would satisfy a reasonable tenant taking a house in Grosvenor Square. As to whitewashing, one knows it is impossible to keep ceilings in the same condition as when they have just been whitewashed. But if, though the ceilings have become blacker, they are still in such a condition that a reasonable man would not say 'I will not take this house because of the state of the ceilings,' then I think that the tenant is not bound, under his covenant to leave the house in tenantable repair, to whitewash them. Take again, the case of a house in Grosvenor Square having an ornamental ceiling, which is a beautiful work of art. A tenant goes in and finds such a ceiling in the house, and in course of time the gilding becomes in such a bad condition, or so much worn off, that the ceiling is no longer ornamental. I should think that a reasonable tenant taking a house in Grosvenor Square would not

require a gilded ceiling at all. If that be so, on the mere covenant to leave the premises in tenantable repair, I should think the tenant who has entered into that covenant was not bound to regild the ceiling at all."

Lastly, the Master of the Rolls dealt with the replacement of the floor. "The question is," he said, "what is the state of the floor when the tenant is called upon to fulfil his covenant? If it has become perfectly rotten, he must put down a new floor, but if he can make it good in the sense in which I have spoken of all the other things—the paper, the paint, the whitewashing—he is not bound to put down a new floor. He may satisfy his obligation under the covenant by repairing it. If he leaves the floor out of repair when the tenancy ends, and the landlord comes in, the landlord may do the repairs himself and charge the costs as damages against the tenant; but he is only entitled to charge him with the necessary cost of a floor which would satisfy a reasonable man taking the premises. If the landlord puts down a new floor of a different kind, he cannot charge the tenant with the cost of it. He is entitled to charge the cost of doing what the tenant had to do under his covenant, but he is not entitled to charge according to what he has himself in fact done."

Calthorpe v. *McOscar* (*e*)—The principle enunciated in *Proudfoot* v. *Hart*, *supra*, that "tenantable repair" means repair such as would satisfy a reasonably minded tenant of the class who would be likely to take the premises in question was considered in *Calthorpe* v. *McOscar* (*e*). Houses in Gray's Inn Road were let when newly built in 1825 for ninety-five years, the lease containing a covenant by the lessee "well and sufficiently to repair." In 1825 the district was a high-class one, but by 1920, when the lease came to an end, its character had entirely changed, and the only lettings then likely were to working-class people on weekly, monthly or quarterly tenancies. Such tenants would not accept any repairing obligations, and their requirements in the way of repair would be of a very moderate standard. The plaintiffs sued the succesors of the original lessee to enforce the covenant, and the defendants contended that their liability was limited, by reason of the principle in *Proudfoot* v. *Hart*, to the cost of executing those repairs, and only those repairs, necessary to satisfy a reasonably minded tenant of the class likely to take the premises *in 1920*. A surveyor appointed by the court assessed the cost of repairs as follows:—

(i) On the assumption that the plaintiff's contention was

(*e*) [1924] 1 K.B. 716.

correct, *viz.*, that the requirements of a tenant in 1920 were irrelevant, then, making due allowance for the age of the premises and the change in the residential character of the locality, the cost would be £586; but

(ii) On the assumption that the defendants' contention was correct and the covenant was to be interpreted in the light of a tenant's requirements in 1920, the cost would be £220.

The principal difference between the two figures arose in the items of outside and structural repair. The class of tenant likely to occupy the premises in 1920 would probably have been content so long as rain did not penetrate the walls and the sanitary inspector did not interfere on the ground that the house was unfit for habitation or nuisance existed on the premises: the surveyor had therefore allowed for pointing, for example, only in small quantities where the brickwork was particularly bad or damp had already appeared in the rooms.

Bankes L.J. in the Court of Appeal expressed the view that *Proudfoot* v. *Hart*, *supra*, laid down no rule of general application, though the language used was quite appropriate to the facts then before the court. "In construing the covenant in the present case, or any other covenant," he continued, "it is material to see what the subject-matter was which the parties had in their contemplation when the covenant was entered into (*f*). Here there is no doubt as to the subject-matter. It was the three houses described in the lease, and the obligation undertaken was the repair of those houses. How can the extent of such an obligation be measured by the requirements of the class of tenant who happen to be occupying the premises ninety-five years afterwards? *Proudfoot* v. *Hart* did not, in my opinion, lay down any such rule. When the facts of that case are looked into, it is manifest that the Lords Justices who decided it had no such questions in their minds. What they were dealing with, and all that they were dealing with, was a three-years' agreement for a tenancy, in which case the class of tenant at the end of the tenancy was, in their view, no doubt the same class as the class of tenant at the commencement. Upon that assumption only is the rule which was laid down by Lopes L.J. and accepted by the Master of the Rolls, in my opinion, explainable or understandable."

Scrutton and Atkin L.JJ. delivered judgments in which *Proudfoot* v. *Hart* was treated in the same way. It does not appear that the court thought that the "reasonably minded tenant" test was wrong in normal circumstances where no question of a

(*f*) *Cf.* the remarks of Willes J. in *Heffield* v. *Meadows* (1869) L.R. 4 C.P. 595.

change in the class of tenant arose and certainly Lord Esher's remarks amount to a more constructive and practical guide to a very vexed problem than does anything said in the later case.

In any event, the provisions of section 18 (1) of the Landlord and Tenant Act, 1927, have, of course, robbed *Calthorpe's* case of much of its former importance and it is submitted that as the damages recoverable by the landlord are now limited to the diminution in the value of the reversion, the standard suggested by Esher M.R. in *Proudfoot* v. *Hart* (such repair as, having regard to the age, character, and locality of the house, would make it reasonably fit for the occupation of a reasonably minded tenant of the class likely to take it) is the appropriate test to apply in assessing the tenant's liability (*g*).

Exception for Fair Wear and Tear

In short tenancies and periodic lettings it is common to find the tenant's obligation to keep or leave in repair qualified by some such clause as "fair wear and tear excepted." A similar clause is occasionally found in leases for longer periods.

It has been well said (*h*) that words and phrases repeated from age to age have little in common but their sound. This consideration rather inhibits discussion of the cases on the phrase "fair wear and tear," which is complex, idiomatic and ancient: it has indeed been common in contracts of tenancy for several centuries. Nevertheless, it is probably accurate to say that it excuses the tenant from liability for disrepair arising from either or both of two distinct causes: (1) the normal action of time and the ordinary elements, *e.g.*, wind and rain; and (2) the normal and reasonable user of the premises by the tenant for the purpose for which the premises are let. The classic example is the wearing-down of a doorstep which is caused (i) by the action of the elements and (ii) to a rather greater extent by the normal passage of the inhabitants of the house. The exception will not, however, excuse liability for disrepair caused by abnormal or extraordinary events, such as lightning, hurricane, flood or earthquake, fire or other accident, or destruction by a catastrophe never contemplated by either party. Accordingly the tenant of a warehouse was not exempted by the clause from liability for damage caused by the collapse of a floor due to overloading (*i*).

Of the many decisions based upon the fair wear and tear clause,

(*g*) *Cf. Portman* v. *Latta* (1942) 86 S.J. 119.
(*h*) *Per* Fifoot in *The Study of Legal History*.
(*i*) *Manchester Bonded Warehouse Co.* v. *Carr* (1880) 5 C.P.D. 507.

the following may be selected as being those of the most practical value:

Terrell v. *Murray* (*k*)—The lease of a house for a short term of years contained no covenant to repair during the term, but a covenant to deliver up the premises at the expiration of the term in as good a state of repair as they were at the commencement, reasonable wear and tear excepted. The tenant was held not liable for painting the exterior, repointing the brickwork, or for repairing part of the kitchen floor affected by dry rot.

Miller v. *Burt* (*l*)—A tenant agreed to keep certain old and dilapidated premises in the same state of repair as when the lease was granted, "fair wear and tear and damage by fire, storm and tempest only excepted." Upon an arbitration, it appeared that the tenant had done no repairs, and that some of the buildings had collapsed. The arbitrator applied to the court for guidance, which was given as follows: "The tenant is responsible for repairs necessary to maintain the premises in the same state as when he took them. If, however, wind and weather had a greater effect upon the premises having regard to their character, than if the premises had been sound, the tenant is not bound so to repair as to meet the extra effects of the dilapidations so caused." This rather elliptical statement possibly foreshadowed the decision in *Taylor* v. *Webb* (*m*). It appears to have inclined to the robust view that a fair wear and tear exception will excuse liability for what Slesser L.J. called (*n*) "consequential damage."

Jones v. *Joseph* (*o*)—Premises were delivered up at the end of a tenancy infested with bugs. The tenant was held liable for breach of his covenant to deliver up in repair, and a clause excepting damage caused by fair wear and tear was held not to avail him.

Citron v. *Cohen* (*p*)—A landlord covenanted to keep the exterior of demised premises in repair, the tenant undertaking to repair the interior, reasonable wear and tear excepted. The tenant was held not liable for damage to the interior caused by the leaking of an outside rain-water pipe which the landlord had failed to repair after notice.

(*k*) (1901) 17 T.L.R. 570.
(*l*) (1918) 63 S.J. 117.
(*m*) [1937] 2 K.B. 283, *infra*.
(*n*) In *Taylor* v. *Webb*, *supra*; see below.
(*o*) (1918) 87 L.J.K.B. 510.
(*p*) (1920) 36 T.L.R. 560.

Consequential Damage

It was at one time commonly, and to some extent is still, argued that the dilapidations which are excused by the insertion of the words "fair (or reasonable) wear and tear excepted" must be moderate in amount having regard to the terms of the undertaking of each case; and, in particular, that, although there might be no liability for the initial effect of wind and weather, nevertheless liability would arise if damage caused by the weather, such as a leak in a roof, were allowed to result in serious damage to the interior of a house. In *Haskell* v. *Marlow* (*q*) a tenant was under an obligation to keep the premises in good repair and condition, reasonable wear and tear excepted. During forty-two years she did nothing actively to injure the house, but nothing substantially to counteract the natural process of decay. In an action to enforce the undertaking it was held that the exception operated to relieve the tenant from liability only for those dilapidations caused by wear and tear which were reasonable not only in character but also in amount, and that the tenant's successors were liable for wear and tear which, though reasonable in character, was wholly unreasonable in amount. This case has since been overruled by the Court of Appeal in the well-known decision of *Taylor* v. *Webb* (*r*). A landlord in effect agreed to keep the outside walls and roof of demised premises in repair, damage by fire and fair wear and tear excepted. After the lease had been running for about three years, water began to enter through defects which appeared in the roof. The slates had cracked and slipped in the ordinary course of nature and as a result of fair wear and tear. The landlord was notified of the defects but did no repairs. Certain rooms in due course became uninhabitable. The Court of Appeal held that the landlord was under no duty to step in and arrest the wear and tear due to natural causes. Slesser L.J. said that *Haskell's* case was indistinguishable from the present one, and that he disagreed with the view that the amount of dilapidation could, by itself, make the damage unreasonable, though it were occasioned by normal wear and tear of the elements. Scott L.J. expressed his disagreement with the reasoning upon which the earlier case was decided, and Farwell J. said shortly that it was wrongly decided, remarking that the non-performance, even for a long period, of acts for which the covenantor was under no initial liability could not create a liability. In the same vein, Slesser L.J. said: "I am unable to see how, if he was under no obligation

(*q*) [1928] 1 K.B. 45.
(*r*) [1937] 2 K.B. 283.

to repair, he can be held liable for the consequential damage which flowed from an obligation to repair walls and roof which was not his. The landlord had no obligation whatever with regard to reparation."

At the same time it seems anomalous that the law may be that a tenant who has covenanted to repair even though subject to an exception for fair wear and tear should be under less obligation than one who has not covenanted to repair at all (as the latter would be fully liable for permissive waste) (*s*).

In *Jones* v. *Geen* (*s*) it was held that a covenant "to keep the premises in good and tenantable repair fair wear and tear excepted" imposed a greater obligation than a covenant to keep the premises "in all respects reasonably fit for human habitation." It is submitted that this would depend upon the nature of the disrepair. For example, if the tenant committed a positive act of injury to the decorations, he would be liable under the former covenant but not under the latter; whereas if the roof leaked owing to fair wear and tear, he would be liable under the latter covenant but not under the former.

Other Exceptions

There are other methods by which a tenant may seek to lighten the burden of a general repairing covenant. It is not uncommon to find a saving which exempts the tenant from liability to repair such important parts of the building as the foundations, the main walls, the main timbers and sometimes the drains. The meaning of such exceptions is reasonably clear, and tenants are relieved by them from many heavy obligations. So too are tenants whose repair obligations extend only to the interior of the demised premises. In such cases the landlord usually undertakes to be responsible for repairing the exterior, which includes any party walls (*t*) and outside drains (*u*). In some leases the exception is in vaguer terms such as "except repairs to the structure" or "except structural repairs," and the use of such language is perhaps to be deprecated, since the intention of the parties cannot easily or certainly be determined from the phrase used. The question may well be asked whether a floor-board is part of the structure or not. The landlord may contend that "structure" refers only to foundations, main walls and main timbers: the tenant, *per contra*, that the whole of the material used in the

(*s*) *Jones* v. *Geen* [1925] 1 K.B. 659.
(*t*) *Green* v. *Eales* (1841) 2 Q.B. 225; *Pembery* v. *Lamdin* [1940] 2 All E.R. 434.
(*u*) *Howe* v. *Botwood* [1913] 2 K.B. 387.

premises constitutes part of the "structure," and that his only responsibility is decorative work.

There are thought to be no cases relating to the interpretation of "structure" or "structural" in the present connection, and in their absence it would be idle to dogmatise. Nevertheless, an argument may be put forward which is based on the normal course of building an ordinary brick and tiled dwelling-house. The work of erection commences with the concrete foundations on which the walls are built; the site of the house is covered with concrete; the external walls are erected with the necessary damp-proof course and wall plates; the internal walls, with fireplaces and chimneys are erected, the floor-joists and partitions put in, and the roof timbers are placed in position. The main structure, or "first carcase," is then complete. The roof is boarded or battened; the tiles, and so on, are fixed; the gutters and rain-water pipes are attached; the drains are laid to carry off the water; the floor boards are laid; the ceilings, walls and partitions are plastered; and the doors, windows and other finishings are done. The *structure* of the house, it is submitted, is thereby completed. Afterwards the landlord's fixtures are put in, so far as he intends to supply them—the services for gas, water and electricity; the stoves and mantels; and the sanitary fittings of all kinds. Finally, the house is painted and decorated.

If the view taken here be correct, landlord's fixtures (and *a fortiori* ornaments and decorations) are not part of the structure of a house. An interesting case on the topic is *Boswell* v. *The Crucible Steel Company of America* (*a*), where large plate-glass windows of business premises were held part of the structure. In an old case (*b*) Bramwell L.J. spoke of windows as "the skin of the house," and it is conceived that the windows of ordinary dwelling-houses are also structural in nature.

Covenant to Paint and Decorate

It is often desirable, particularly in long leases, to lay down the tenant's obligations with regard to painting and decorating more closely than can be done by means of a general repairing term.

How far painting and decorating are covered by such a term is indeed somewhat doubtful. In an old case (*c*) a tenant who covenanted "substantially to repair uphold and maintain" a house was held to be bound to keep up the inside painting. In 1886

(*a*) [1924] 1 K.B. 119.
(*b*) *Bell* v. *Plummer* (1879) *The Times*, June 17, 1879.
(*c*) *Monk* v. *Noyes* (1824) 1 C. & P. 265.

the Court of Appeal held that a tenant who had agreed to keep the inside of the premises in tenantable repair and had done no papering or painting for seventeen years was bound only to paint and paper so as to prevent the house from going to decay (*d*). The rule in *Proudfoot* v. *Hart*, *supra*, now probably governs the matter: the words "good tenantable repair" involve a tenant in liability for such papering, painting and whitewashing as would be necessary to satisfy a reasonably minded tenant of the class likely to take the house.

Whatever the position, more accurate definition of the tenant's obligation has obvious advantages from the landlord's point of view. The following example of a "paint clause" is taken from Prideaux's *Precedents in Conveyancing*:—

"To paint with two coats at least of good oil colour or with a proper coating of creosote tar or varnish in a proper and workmanlike manner all the wood iron and other work in or about the premises previously or usually painted tarred or varnished as to outside work in every third year of the said term and as to inside work in every seventh year of the said term and at the same time with every inside painting to whitewash and colour such parts of the inside of the premises as are usually whitewashed and coloured and paper with paper of suitable quality such parts thereof as are usually papered."

Not only are clauses of the kind used to ensure that tenants carry out painting necessary for the preservation of the structure of demised premises, but they are also employed to compel tenants to maintain the decorations in a style and condition suitable to the class of house concerned. It is usual for covenants to provide for outside painting once in three years, inside painting once every seven years, and internal decoration at the same time as the inside painting: this is indeed the form set out above. It may be preferable, however, to state the particular years in which the work is to be done and to provide for it to be done in the last year of the term.

In long occupation leases of good-class houses the paint covenant may be detailed and onerous. For example, in a lease of a London terrace-house for twenty-one years from March 25, 1955, at £250 per annum, there might be separate covenants to paint outside and to paint and decorate inside, as follows:—

"In the year one thousand nine hundred and fifty-eight and thereafter once in every three years of the said term and also during the last year thereof at the same time and to correspond

(*d*) *Crawford* v. *Newton* (1886) 36 W.R. 54.

with the adjoining houses paint the outside wood and iron and stucco and cement work of the said demised premises and the additions thereto with two coats of good oil and white lead paint in a proper and workmanlike manner and of a tint or colour to be approved by the lessor."

"In the year one thousand nine hundred and sixty-two and thereafter once in every seven years of the said term and also during the last year thereof paint all the inside wood and iron and other work usually painted of the said demised premises and all additions thereto with three coats of good oil and white lead paint in a proper and workmanlike manner and afterwards grain, marble and varnish the parts usually or previously grained, marbled and varnished and also if not painted as hereinbefore provided wash distemper and whiten all ceilings and colour all walls and strip and repaper the rooms and staircase where previously papered and size and varnish the staircase all in such manner and with such materials as may be approved by the lessor."

Care is sometimes necessary about the stipulation as to time. Where there is a covenant to execute specific repairs in a particular year, the obligation to perform the covenant attaches as soon as the year commences (*e*). In *Dickinson* v. *St. Aubyn* (*f*) a landlord granted a lease for seven years with an option to the tenant to break at the end of the fifth year. A covenant was included to paint in the last quarter of the "said term." Other covenants referred to the end of "the tenancy." It was held in the circumstances the "said term" was the full term of seven years, and that a determination by the tenant in the fifth year relieved him of the obligation to paint. Draftsmen should state expressly whether work is to be done in the last year of the actual tenancy or in the last year of the full term.

Finally, the position under section 147 of the Law of Property Act, 1925, may be briefly recalled. The painting of the outside wood and iron work of a house at frequent intervals is necessary for the preservation of those materials from decay, but the decoration of the interior every seven years is often unnecessary, and insistence by the landlord on the strict observance of the covenant when the lease has many years to run may be a hardship upon the tenant. The statute, as is well known, recognises this fact and affords a means of relief.

(*e*) *Kirklinton* v. *Wood* [1917] 1 K.B. 332.
(*f*) [1944] 1 All E.R. 370.

THE LEGAL POSITION OF CONFIRMING HOUSES

A note on Rusholme Ltd. *v.* S. G. Read Ltd.

[1955] 1 W.L.R. 146; [1955] 1 All E.R. 180

It is astonishing to find that apparently *Rusholme Ltd.* v. *S. G. Read Ltd.* is the first reported case on the legal position of confirming houses. One of the commonest ways of dealing satisfactorily with buyers abroad, particularly if the transactions are not overlarge, is for the sellers to insist on the order being confirmed by a confirming house in this country. The function of the confirming house is rather different from that of a *del credere* agent for the latter is the agent of the seller: he effects a sale on behalf of his principal and guarantees the solvency of the buyer; his obligations cease there. The confirming house is an agent of the buyer and his functions are far more extensive. A person who wishes to buy goods, say, in Australia will send his indent to the suppliers in England and a copy of the indent to his confirming house. The indent will include a provision to the effect that confirmation and payment will be by the confirming house. The confirming house then sends an order to the suppliers in England, the order being on the same terms as in the indent and containing a cross-reference to it. In due course, when the goods are ready, the confirming house gives the shipping instructions, sees to the insurance and pays for the goods. Then, if everything is in order, the matter is completed except for the accounting between the Australian buyer and his confirming house. If, however, the goods are not in accordance with the contract or there is some other breach, the confirming house in London will take up the matter with the suppliers.

There is a variation of this procedure which is usually applicable where the English supplier maintains an agent in the country where the customers are. In such a case, the original order is sent direct to the suppliers and a copy sent to the confirming house as in accordance with the above practice, but in this case the confirming house does not send a complete and separate order but merely sends a note to the effect that it confirms the original order. This procedure is only adopted in about 5 per cent. of the cases where confirming houses are employed and the procedure first described adopted in the other cases.

In *Rusholme Ltd.* v. *S. G. Read Ltd.* it was the first described procedure that was before the court. The buyers were in Australia and sent an order to the plaintiff sellers, one of the terms of which was " confirmation and payment by " the defendant confirming house. The defendants also sent in an order to the plaintiffs for the same goods giving the same details, the order purporting to be a purchase in the defendants' name. That order was accepted by the plaintiffs to the defendants. The Australian buyers cancelled the order and the question arose whether the defendants were liable for non-acceptance. Although it did not affect the legal position, the error of the defendants was their failure to see that the Australian buyers established a letter of credit in favour of the defendants before they gave, in their turn, their order to the plaintiffs.

The evidence of commercial usage and practice was apparently confined to the plaintiffs' and defendants' directors. The plaintiffs' director said that he looked to the confirming house and the confirming house only: the contract was with them. Although in the witness-box the defendants' director denied that they undertook a general obligation as buyers, they had previously written to the Australian buyers that their confirmation created " a liability as far as we are concerned and the manufacturers can, of course, hold us responsible." Pearce J. had little difficulty in arriving at the conclusion that the confirming house was liable for non-acceptance. His view was that the contract of sale was between the plaintiffs and defendants only and that the Australian buyers were no parties to the contract. There is little doubt that this decision is in accordance with the understood commercial usage. The learned judge's statement that, where an agent contracts on behalf of a foreign principal, there is a presumption that he is incurring a personal liability unless a contrary intention appears would, however, seem open to question. Although this view was held for some considerable time, it has generally been accepted that it no longer accords with the modern law.

The court did not have to consider what would have been the position had the second method of procedure described above been adopted. It would seem that in such a case there is a tripartite contract under which the foreign buyer is the genuine buyer and the confirming house's obligation to the seller limited to actual payment. Its liability would seem to be greater than that of a *del credere* agent in that it would not merely guarantee the solvency of the buyer but would undertake a primary obligation to pay. On the other hand, the foreign buyer would be able to sue direct on the contract for any breach. It would also seem that in such a case the confirming house would be responsible for non-acceptance.

NOTES OF RECENT CASES

1. *REAL PROPERTY*

By F. R. Crane, ll.b., Solicitor

Bull v. *Bull* [1955] 2 W.L.R. 78; [1955] 1 All E.R. 253 (C.A.)

Tenancy in common—purchase-money provided in unequal shares—conveyance to one tenant in common—trust for sale—rights to possession—Law of Property Act, 1925, *ss.* 1 (6), 26, 30, 34–38; *Settled Land Act,* 1925, *s.* 36.—A son and his mother, plaintiff and defendant respectively, provided the purchase-money for a house in unequal shares, that of the son being the larger. The conveyance was made to the son alone but, on the facts, there was no gift or advancement; consequently they were beneficially entitled as tenants in common in undivided shares. For some four years the parties lived together in the house but now, differences having arisen after his marriage, the son brought an action for possession.

The Court of Appeal (Denning, Hodson and Parker L.JJ.) held, first, that since the beneficial interest was held in undivided shares the son held the legal estate on the statutory trust for sale. The court thereby confirmed the general opinion as to the effect of a conveyance of this type (see *Re Rayleigh Weir Stadium* [1954] 1 W.L.R. 786; [1954] 2 All E.R. 283, and Halsbury, *Laws of England,* 2nd ed., Vol. 27, at p. 757, note (e)), though without analysing the relevant sections which do not expressly cover the case (Law of Property Act, 1925, ss. 1 (6), 34–38; Settled Land Act, 1925, s. 36). Presumably such a single trustee can pass a good title to a bona fide purchaser for value without notice of the existence of the trust.

Secondly, the son was held not to be entitled to possession. Denning L.J., with whose judgment the other Lords Justices concurred, said that equity should now follow the former law as to legal tenants in common, referring to *Cowper* v. *Cowper* (1734) 2 P.Wms. 720, and citing dicta by Maugham J. in the ademption case of *Re Warren* [1932] Ch. 42, that the statutory trust for sale did not affect enjoyment before sale. (*Cf. Re Davies* [1932] 1 Ch. 530.) The learned Lord Justice therefore held that "until a sale takes place these equitable tenants in common have the same right to enjoy the land as legal tenants in common used to have," so "each of them is entitled concurrently with the other to the possession of the land and to the use and enjoyment of it in a proper manner; and neither of them is entitled to turn the other out" ([1955] 2 W.L.R. at p. 80; [1955] 1 All E.R. at p. 255).

Thirdly, Denning L.J. went on to say that the son's proper course was to appoint a co-trustee under the Trustee Act, 1925, s. 36 (6), and to apply to the court for an order for sale and possession under

the Law of Property Act, s. 30 (providing that if trustees for sale refuse to sell, or exercise any of their powers, or any requisite consent cannot be obtained, any person interested may apply to the court which may make such order as it thinks fit). Denning L.J. said the mother's consent was necessary because her occupation was protected by the Law of Property Act, ss. 14 and 35; the former section preserves the rights of persons in possession, and the latter, declaring the statutory trusts, requires trustees to hold the proceeds of sale and net rents and profits till sale to give effect to the rights of persons interested in the land.

It is convenient to consider first the wider implications of this judgment. Before 1926 beneficiaries with equitable interests in land under trusts were not entitled to possession as of right but only in the discretion of the trustees, duly controlled by the court, which was fairly ready to give possession (see *Re Earl of Stamford and Warrington* [1925] Ch. 165, reviewing the earlier authorities). The same rules applied to beneficiaries under trusts for sale (*Re Bagot's Settlement* [1894] 1 Ch. 177). After 1925 this law must continue to apply to express trusts for sale, but need not *ex hypothesi* apply to the statutory trust for sale which is primarily a conveyancing device—though the courts have in general (not without criticism) given effect to the doctrine of conversion. Moreover, the Law of Property Act, s. 26 (3), requires statutory trustees for sale to consult the beneficiaries and give effect to their wishes, or to those of the majority by value, so far as consistent with the general interest of the trust. However, the Court of Appeal's own earlier decision in *Re Landi* [1939] Ch. 828 (not here cited) cannot, it is submitted, be reconciled with the proposition that equitable tenants in common can still claim possession as of right. In *Re Landi* the imposition of the statutory trust for sale was held to stop time running under the Real Property Limitation Act, 1874, s. 12, in favour of a legal tenant in common possessing adversely to his co-tenant. Sir Wilfrid Greene M.R. (with whom Clauson and Goddard L.JJ. concurred) said that after 1925 tenants in common held on trust for sale and " in the meantime their possession is the possession of trustees, because it is in that capacity that they hold the legal title " ([1939] Ch. at p. 835). After emphasising strongly the change of character which occurred on the Law of Property Act coming into force, he added: " when one tenant in common dies now (I will still call him a tenant in common) his legal personal representatives have no right to go into possession and have no right to collect the rents. That right survives, and survives only, to the survivor in his capacity as surviving trustee " ([1939] Ch. at p. 836).

It is therefore respectfully submitted that the law laid down in *Re Bagot* now applies to both express and statutory trusts for sale; beneficiaries are not entitled to possession as of right, though the trustee should give it in proper cases, especially where section 26 (3) of the Law of Property Act applies.

If this submission be accepted the present decision must, with respect, be limited to its particular facts—a sole trustee for sale cannot eject his co-beneficiary so as to give himself sole enjoyment of the trust property, leaving a separate action to be brought

for the proper administration of the trust. Here it is convenient that the Court of Appeal should refer to the Law of Property Act, s. 30, for all questions can thereby be settled and the court will not make orders that operate unfairly (*Re Buchanan-Wollaston's Conveyance* [1939] Ch. 738; *Re Hyde's Conveyance,* unreported, noted 16 *Conveyancer* (N.S.) 132). Section 30 therefore provides the appropriate remedy if trustees disagree or will not act (*e.g.,* under sections 28, 29, of the Act or by giving possession); if a consent made necessary by the instrument cannot be obtained (*Re Beale* [1932] 2 Ch. 15); or if consent is needed under section 26 (3)—see Wolstenholme and Cherry's *Conveyancing Statutes,* 12th ed., Vol. 1, at p. 275. A purchaser, however, is concerned only with not more than two consents made necessary by the disposition (L.P.A., s. 26 (1)); provided he pays his money to two trustees or a trust corporation other matters concerning the beneficial interests do not affect him (L.P.A., ss. 26 (3), 27 (1) (2)). Consequently, it seems that a beneficiary even in possession could not assert any right against a bona fide purchaser, even with notice, from duly constituted trustees. In a case like the present, however, occupation would serve to give notice of the existence of the trust.

Cooper v. *Critchley* [1955] 2 W.L.R. 510; [1955] 1 All E.R. 520 (C.A.)

Interest in land—memorandum in writing—tenants in common—sale of interest in proceeds of sale—Law of Property Act, 1925, *ss.* 40, 205 (1), (ix) and (x).—Plaintiff and defendant held certain land in fee simple as joint tenants on trust for sale, and to hold the proceeds for themselves as tenants in common. They leased the land to a limited company of which they were sole directors and shareholders. Negotiations for a sale by the plaintiff of all his interests to the defendant having taken place, the action was brought for specific performance of an alleged contract. The Court of Appeal (Evershed M.R., Jenkins and Hodson L.JJ.) held, affirming Vaisey J., that there was no concluded contract, and it therefore became, as Jenkins L.J. remarked, strictly unnecessary to decide the further point on which the case is reported. This is that a contract to transfer an interest in the proceeds of sale of land held on trust for sale is within section 40 of the Law of Property Act, 1925, and must be evidenced in writing (the view taken in Wolstenholme and Cherry's *Conveyancing Statutes,* 12th ed., Vol. 1, at p. 278).

Jenkins L.J. (with whom the other members of the court concurred) mentioned the applicability of the doctrine of conversion to cases of disposition and devolution, citing *Re Price* [1928] Ch. 579, but preferred to follow the cases which treated notional proceeds of sale as land for the purposes of the Limitation Acts, *e.g., Re Fox* [1913] 2 Ch. 75; *Re Whitham* [1922] 2 Ch. 413. He further held that, although the definition of "land" in the Law of Property Act, 1925, s. 205 (1) (ix), expressly excludes an undivided share in land, that did not prevent a share in notional proceeds of sale from being an

" interest in land " within section 40, pointing out that section 205 (1) (x) included an interest in proceeds of sale in the definition of " equitable interest." No reference was made to *Stevens* v. *Hutchinson* [1953] Ch. 299, where Upjohn J. took the view that despite the definitions the expression " equitable interest in land " did not include an interest in the proceeds of sale. In that case it was held that a receiver by way of equitable execution on an interest under a trust for sale acquired no charge on any equitable interest in land by reason of the Law of Property Act, s. 195, and was not a person " interested in the land " so as to be able to apply for an order of sale under the Law of Property Act, s. 30. (*Cf. Re Rayleigh Weir Stadium* [1954] 1 W.L.R. 786.)

In his judgment Jenkins L.J. went on to say that even if wrong in his general conclusion he thought section 40 of the Law of Property Act must apply when " by virtue of the transaction the purchaser will acquire, subject to and with the benefit of the lease, the whole estate, legal and beneficial, in the entirety of the land " ([1955] 2 W.L.R. at p. 517; [1955] 1 All E.R. at p. 524). With respect, the legal estate would remain in the trustees for sale unless they made an express conveyance thereof—a mere transfer of the beneficial interest would not affect the legal estate, though, of course, the defendant would, in this case, have become entitled to call for a formal transfer of the legal estate. There is, too, other authority for regarding contracts that will or may eventually result in the transfer of land as requiring evidence in writing (see *Gray* v. *Smith* (1890) 43 Ch. 208, and Dart, *Vendor and Purchaser,* 8th ed., Vol. 1, at pp. 199 *et seq.*), but it does not follow that there is any charge registrable under the Land Charges Act, 1925. (In *Re Rayleigh Weir Stadium, supra.*)

Jess B. Woodcock & Sons v. *Hobbs* [1955] 1 W.L.R. 152; [1955] 1 All E.R. 445 (C.A.)

Deserted wife in matrimonial home—sale by husband to purchaser with notice—action for possession—discretion of court to give possession.—It is somewhat surprising to find that this case is not to appear in the *Law Reports,* for it adds a new chapter to the history of the deserted wife's right in the matrimonial home.

A husband, a tenant, deserted his wife in 1940; in 1948 he purchased the freehold, which was compulsorily acquired by the British Transport Commission in 1950, and sold in 1954 by them to the plaintiffs, the contract being expressly subject to the wife's rights. The plaintiffs sued for possession. The county court judge, having found that the defendant was in occupation as a deserted wife and not as caretaker (as her husband had alleged in correspondence) held he could not in these proceedings order the wife out. The plaintiffs appealed.

The decision of the Court of Appeal (Denning, Birkett and Parker L.JJ.) carries little further the question of how far a deserted wife's licence binds a purchaser. Denning L.J. held that it did—" the wife's right is an equity "; Birkett L.J. apparently agreed but Parker L.J.

reserved his opinion, seeing great difficulty in giving the wife any rights against a bona fide purchaser with or without notice.

All three Lords Justices, however, held that, assuming the wife's right to be binding on the purchaser, the court had a discretion to turn her out, and made an order for possession in three months. (Both Denning and Birkett L.JJ. said the wife could not remain indefinitely paying no rent, but it is not clear why this should affect the wife of a husband entitled in fee simple.) This decision, it will be seen, avoids the dilemma of either allowing a deserting husband to nullify his wife's licence by means of sale, or of putting a successor in title, because of procedural difficulties, in a worse position than the husband—a matter which concerned the court in *Bendall* v. *McWhirter* [1952] 2 Q.B. 466. The difficulty is that the judgments do not, with respect, make clear the basis of such discretion. It appears most likely that the Court of Appeal was holding section 17 of the Married Women's Property Act, 1882, to be applicable in an action for possession by a purchaser from the husband. Denning L.J. (who suggested in *Bendall* v. *McWhirter,* at p. 484, that successors in title could use section 17), said that to stay till the court orders her out " is the only right she has against her husband, and it is the only right she has against her successors. The court always has a discretion in the matter " ([1955] 1 W.L.R. at p. 156; [1955] 1 All E.R. at p. 449). Birkett L.J., after referring to a reference to section 17 in *Bendall* v. *McWhirter* said: " it is open to this court to deal with this matter of discretion " (1 W.L.R. at p. 159; 1 All E.R. at p. 451). On the other hand, in *Bendall* v. *McWhirter,* Romer L.J., with whom Somervell L.J. concurred, did not think section 17 available to any successors in title at all ([1952] 2 Q.B. at p. 488, and see the reference to procedure in argument at pp. 464–74). Apart from the instant decision the terms of section 17 and the context of the Married Women's Property Act, 1882, would seem, with respect, to favour this latter view.

Alternatively, the Court of Appeal may have been relying on an inherent discretion—see *per* Denning L.J. in *Bendall* v. *McWhirter* [1952] 2 Q.B. at p. 484. In this event the deserted wife appears to have an equitable interest at the discretion of the court, surely a new departure in our law of property? A court of equity has, of course, discretion to refuse the grant of an equitable remedy on any of the recognised grounds, such as laches, failure to do equity, etc. This is the basis on which restrictive covenants are not enforced if the character of the neighbourhood has changed (*Knight* v. *Simmonds* [1892] 2 Ch. 294; *Sobey* v. *Sainsbury* [1913] 2 Ch. 513). But this is very different from holding an equitable interest, once established, non-existent at the suit of the holder of the legal estate; a procedure which is not easily reconciled with the views of the House of Lords in *Chapman* v. *Chapman* [1954] A.C. 429—and see the remarks as to equitable discretion in *Cowper* v. *Cowper* (1734) 2 P.Wms. 1720 at pp. 753-4. Statutory discretions, *e.g.*, under the Married Women's Property Act, 1882, s. 17, the Law of Property Act, 1925, s. 30, and the Trustee Act, 1925, s. 57, have been given because the ordinary law gives none. Nevertheless, whatever the juridical difficulties, the decision seems to be relevant in practice whenever anyone seeks

possession against a deserted wife. It cannot, presumably, apply to contractual licences (if these are enforceable against successors in title) because they are not originally the creation of the court.

Robinson v. *Richmond (Surrey) Borough Council* [1955] 2 W.L.R. 333; [1955] 1 All E.R. 321 (D.C.)

Highway—footpath—repairable by inhabitants at large—Highway Act, 1835, *ss.* 5, 23—*Private Street Works Act,* 1892, *ss.* 4–7.—At common law a highway is repairable by the inhabitants at large, and may be created by mere dedication and user, which are readily inferred. Early in the nineteenth century the rules were found to be casting an undue burden on the public, so the Highway Act, 1835, provided by section 23: "No road or occupation way made or hereafter to be made . . . nor any roads set out or to be set out as a private driftway or horsepath in any award of commissioners under an Inclosure Act" should be repairable by the public unless certain conditions as to notice, repair, etc., were complied with. The general effect has been that highways are not repairable by the public until taken over by the appropriate authority under one of the various statutes in that behalf, when, of course, the frontagers pay for the cost of making up.

In this case a strip of land was left between the road and houses built on adjoining land, and in due course a footpath, held to be a highway, was formed (separated from the road). Frontagers, having been charged with the cost of making up under the Private Street Works Act, 1892, which is inapplicable to highways repairable by the inhabitants at large (ss. 5, 7), objected on the ground that footpaths were not within the Highway Act, 1835, s. 23. The term "highway" at common law includes a footway (Co.Litt. 56b) and by section 5 of the 1835 Act includes "all roads, bridges . . . carriageways, cartways, horseways, bridleways, footways, causeways, churchways and pavements." The Divisional Court (Lord Goddard C.J., Cassels and Streatfeild JJ.) pointing to the difference in terms between sections 5 and 23 of the Highway Act, 1835, held that the latter section did not include a footpath.

This decision is a new departure of considerable importance to both landowners and local authorities. In the statutory definitions the term "street" includes a footpath (see *Richards* v. *Kessick* (1888) 59 L.T. 318; *Property Exchange, Ltd.* v. *Wandsworth Board of Works* [1902] 2 K.B. 61), and in the present case quarter sessions found there was a new street. Indeed, in *Richards* v. *Kessick* (*supra*) (cited in argument here but not referred to in judgment) a path of this type was said by a Divisional Court not to be repairable by the inhabitants. In *Reynolds* v. *Barnes* [1902] 2 Ch. 361, Parker J. said *obiter*, that the phrase "private driftway or horsepath" in the second leg of section 23 (*supra*) would include a footpath. Further, sections 47–50 of the National Parks and Access to the Countryside Act, 1949, appear to have been drafted on the assumption that footpaths were within the Highway Act, 1835. An analysis of these matters would

have been welcome in the present case, for it is thought that local authorities have generally taken the view (as here) that they are not by law liable for the repair of footpaths. Nevertheless, this particular point of interpretation does not seem to have been taken before, and there is certainly force in Lord Goddard C.J.'s remark that if section 23 of the Highway Act, 1835, " had been intended to apply to every form of highway, it would have been very easy to have said so " (2 W.L.R. at p. 337; 1 All E.R. at p. 323).

It may be added that leave to appeal was given.

R. v. *Minister of Housing and Local Government, ex p. Finchley Borough Council* [1955] 1 W.L.R. 29; [1955] 1 All E.R. 69 (D.C.)

Street works—recovery of cost—memorial to Minister—powers of Minister—land extra commercium—*Public Health Act,* 1875, *ss.* 150, 268.—By section 150 of the Public Health Act, 1875, a local authority can recover the cost of making up streets either by or from the owners of the adjoining land, or by a rate on the occupiers thereof. By section 268 of the Act any person aggrieved by such process may address a memorial to the Minister of Housing and Local Government (replacing the Local Government Board) who may make such order as may to him seem equitable. " Owner " is defined (s. 4) to be the person for the time being receiving the rack-rent of the land or premises " or who would so receive the same if such lands or premises were let at a rack-rent." It is established that this definition, which appears also in other similar Acts, does not include the owner of land which is *extra commercium* and can produce no rent (*Great Eastern Ry.* v. *Hackney Board of Works* (1883) 8 App.Cas. 689; *London County Council* v. *Wandsworth Borough Council* [1903] 1 K.B. 797). In the present case, the Finchley Borough Council having proposed to recover a lump sum from the London Transport Executive in respect of an embankment supporting an approach road to a bridge, the Minister decided under section 268 (*supra*) that no charge should be made because the land was commercially valueless and could produce no rent. The Divisional Court (Lord Goddard C.J., Cassels and Devlin JJ.) refused to grant the council an order of certiorari to quash the Minister's decision, holding (1) that the " decision " necessary to bring section 268 into play was that of the local authority to recover the costs by lump payment (see especially the judgment of Devlin J.); (2) that the Minister had the widest possible power to take in account any matters, including matters of law (following *R.* v. *Local Government Board* (1882) 10 Q.B.D. 309). Counsel for the local authority had argued that the Minister had no power to construe the definition of the word " owner " in the Public Health Act, 1875; (3) *per* Lord Goddard C.J. and Cassels J., that the land was rightly held *extra commercium* because the evidence showed it was in fact worthless and could not be let.

Bursted Properties, Ltd. v. *Denton U. D. C.* [1955] 1 W.L.R. 82; [1955] 1 All E.R. 273 (*sub nom. Denton U. D. C.* v. *Bursted Properties, Ltd.*) (D.C.)

Paving of yards and passages—whether front gardens included—Public Health Act, 1936, *s.* 56 (1).—" If any court or yard appurtenant to, or any passage giving access to, a house " is not so flagged, asphalted, paved, etc., as to allow for proper surface drainage, the local authority may require the owner to carry out the necessary works (Public Health Act, 1936, s. 56 (1)). The Divisional Court (Lord Goddard C.J., Cassels and Lynskey JJ.) here held that an ordinary front garden comprising grass, flower beds and paths, leading to the front and side doors, was not within the section, and therefore notices served by the local authority were bad. The section may apply, however, to a court or yard where a car could be washed (see *per* Lord Goddard C.J. at [1955] 1 W.L.R. 84; [1955] 1 All E.R. 274).

Portman Building Society v. *Gallwey* [1955] 1 W.L.R. 96; [1955] 1 All E.R. 227 (Ch.D.)

Mortgage—limitation of action against sureties—part payment by stranger—company as receiver—Companies Act, 1929, *s.* 306; *Law of Property Act,* 1925, *s.* 109.—" A body corporate shall not be qualified for appointment as receiver of the property of a company " on penalty of a fine of £100 (Companies Act, 1948, s. 366, replacing Companies Act, 1929, s. 306). Failure to observe this prohibition had a curious sequel in the present case, where the plaintiff mortgagees sued the defendants as sureties of a mortgage debt created by a property company in 1936. Throughout the continuance of the mortgage the property had been in the hands of receivers appointed under an earlier mortgage (postponed by arrangement to that of the plaintiffs). Up to 1938 a firm of solicitors were receivers but thereafter limited companies were appointed, though the solicitors actually received rents and made payments. The sureties' liability under the mortgage to the plaintiffs had arisen in 1940 and they now pleaded the Limitation Act, 1939. The plaintiffs replied that payments on account had been made by the receivers (in fact until shortly before action) who were agents for the mortgagors by virtue of the Law of Property Act, 1925, s. 109 (2). Such a payment, of course, causes time to run afresh and binds all persons liable for the debt (Limitation Act, 1939, ss. 23 (4), 25 (6)); an acknowledgment binds only the person making it and his successors (s. 25 (5)). Wynn-Parry J. held that the provisions above cited of the Companies Act rendered the appointment as receiver of the limited companies a nullity, so that the payments were in effect made by a stranger, which does not affect the operation of the Limitation Act, 1939 (*Re Clifden* [1900] 1 Ch. 774).

The learned judge pointed out that his decision was based on the erroneous pleading of the Law of Property Act, 1925, s. 109 (2). It is sufficient, for example, for the creditor to show that payment was made by a person bound, as between himself and the debtor, to make

it (see *Bradshaw* v. *Widdrington* [1902] 2 Ch. 430 where the facts had a certain resemblance to the instant case). Some such line of attack might have avoided the difficulty encountered by the plaintiffs.

Chelsea Estates Investment Trust Co., Ltd. v. *Marche* [1955] 2 W.L.R. 139; [1955] 1 All E.R. 195 (Ch.D.)

Mortgage—leaseholds—relief against forfeiture obtained by mortgagee—whether right of redemption preserved—Law of Property Act, 1925, *s.* 146 (4).—The equitable maxim " once a mortgage always a mortgage " means, *inter alia*, that a mortgagor is not to be deprived of his right to redeem by any change in the nature of the mortgaged property. Thus if the security consists of a lease with an option to renew or to purchase the freehold, and such option is exercised by the mortgagee, the mortgagor can nevertheless redeem the new lease or freehold on payment of principal and the renewal or purchase price (*Re Biss* [1903] 2 Ch. 40; *Nelson* v. *Hannam* [1943] Ch. 59). In the present case this principle was applied to a new term vested in the mortgagee by the court, by way of relief under the Law of Property Act, 1925, s. 146 (4), after the landlord had taken forfeiture proceedings against the mortgagors. Upjohn J. held, following *Ewart* v. *Fryer* [1901] 1 Ch. 512, that the purpose of section 146 (4) of the Law of Property Act was to protect the vested interest of the mortgagee, and that this interest was subject to redemption.

The consequence of this conclusion is, as the learned judge remarked, that on redemption the landlord may again acquire a tenant already declared unsatisfactory and refused relief by the court. This may involve hardship, but a contrary decision would make a successful application for relief by a mortgagee a short cut to foreclosure, which if intended could have been specifically enacted.

It may be noted that in this case the mortgagee had a charge by way of legal mortgage and obtained relief on the authority of *Grand Junction Canal Co.* v. *Bate* [1954] 2 Q.B. 160 (noted *ante*, Vol. 18, p. 418).

Mills v. *Avon and Dorset River Board* [1955] 2 W.L.R. 413; [1955] 1 All E.R. 382 (Ch.D.)

Fishery—grant of annual licences to owner—powers of River Board—Salmon and Freshwater Fisheries Act, 1923, s. 61.—A fishery is a species of property in land, conferring the right to take fish, either united with the ownership of the soil beneath the water, or separately as a *profit à prendre* (Co.Litt. 4b; *Marshall* v. *Ullswater Steam Navigation Co.* (1863) 3 B. & S. 732). Nevertheless, the exercise of this right has been controlled by the State since the time of Magna Carta, the present law being contained in the Salmon and Freshwater Fisheries Act, 1923, and administered by fishery boards set up by the Minister of Agriculture and Fisheries, in whom ultimate

control resides. Apart from general restrictions as to seasons and modes of fishing, no person may fish at all without a licence (ss. 61, 63). The owner of a fishery has, however, a prima facie right to a general licence, under which he can authorise anyone else to fish, subject to such conditions and payment as may be agreed or as the Minister may determine (s. 61). The Avon and Dorset River Board refused to grant any general licences for 1954 because some licensees had used those licences as a commercial asset, and not merely for friends or guests, thereby depriving the Board of revenue from the issue of licences. Vaisey J., in a considered judgment, held that section 61 of the Act gave the Board no power to withhold general licences indiscriminately but merely to impose conditions or payments on particular owners. Therefore the plaintiffs, fishery owners who had not commercialised their property, were entitled to a general licence.

2. *TRUSTS*

By F. R. Crane, ll.b., Solicitor

Re Harrison's Settlement; *Re Ropner's Settlement* [1955] 2 W.L.R. 256; [1955] 1 All E.R. 185 (C.A.)

Variation of settlements—practice—jurisdiction of judge to review order not entered.—The Court of Appeal has affirmed the decision of Roxburgh J. (noted *ante*, Vol. 18, at p. 421). Until an order pronounced by a judge is drawn up, passed and entered he has a discretion, which must be judicially exercised, to withdraw, alter or modify it; such recall may be initiated either by the parties or by the judge. The Court of Appeal rejected the argument that in the instant cases the order, being proper when made, should stand, on the ground that *Chapman* v. *Chapman* [1954] A.C. 429 did not alter but merely declared the law (*per* Jenkins L.J., delivering the judgment of the court, at [1955] 2 W.L.R. p. 266; [1955] 1 All E.R. p. 192). Theoretically, of course, this principle applies to all judgments, but where discretion to modify is concerned there may perhaps be a distinction between a decision settling a disputable point, like *Chapman* v. *Chapman*, and one upsetting an established line of cases.

The Court of Appeal relied principally on the cases considered in the court below but also refused to follow some remarks made by Lord Westbury (sitting in the Chancery Division) when deciding *Re Risca Coal and Iron Co., ex p. Hookey* (1862) 4 De G.F. & J. 456, to the effect that "the whole theory of judicial procedure" required orders to be final as soon as pronounced. The case was concerned with time for appealing and Lord Westbury's conclusion has been deprived of much of its force by the fact that time for appealing now generally runs from the time at which the judgment or order is "signed, entered or otherwise perfected" (see R.S.C., Ord. 58, rr. 15, 20; Ord. 59, rr. 3, 34).

Re Cochrane, Shaw v. *Cochrane* [1955] 2 W.L.R. 267; [1955] 1 All E.R. 222 (Ch.D.)

Settlement—failure to provide for contingency actually happening —power to fill gap by construction—resulting trust.—Where the draftsman of a settlement or will has failed to provide for all contingencies the court can fill the gap by construction, provided the intention is clear and plain from the document itself (*Re Akeroyd* [1893] 3 Ch. 363; *Re Tredwell* [1891] 2 Ch. 640).

Trustees of a post-nuptial settlement held upon trust to pay income to the wife so long as she resided with her husband and thereafter to him for life; after the death of the survivor the property was to be held for issue of the marriage as husband and wife should jointly appoint, or as the survivor should appoint; in default of appointment sons took at twenty-one and daughters at twenty-one or marriage. The wife both left and survived the husband, and consequently the declared trusts did not cover the period of her survival. Harman J., applying the principles and the cases mentioned above, found himself unable to see clearly what should be put in, especially as the power to alter the beneficial interests by appointment continued during the wife's life. Consequently there was a resulting trust for the settlors.

Re Brassey's Settlement [1955] 1 W.L.R. 192; [1955] 1 All E.R. 577 (Ch.D.)

Settlement—investment clause—stocks of "British colony or dependency"—Canadian stock—Statute of Westminster, 1931.—Trustees of a settlement made in 1936 with authority to invest in (*inter alia*) stocks of "any British colony or dependency" desired to purchase stock of banking companies carrying on business in Canada. Danckwerts J. held that this was not possible, for after the passing of the Statute of Westminster, 1931, the words "colony or dependency" have become entirely inappropriate to describe the Dominion of Canada; dicta in a contrary sense in *Re Maryon-Wilson's Estate* [1912] 1 Ch. 55 were distinguished because made in relation to quite a different political state of affairs. The learned judge then permitted the investment under the Trustee Act, 1925, s. 57.

(For investment clauses, see K. & E., 15th ed., Vol. II, pp. 645–8.)

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3. *CHARITIES*

By A. Kiralfy, Barrister-at-Law

Hadaway v. *Hadaway* [1955] 1 W.L.R. 16 (J.C.P.C.)

Fourth class of charities—public benefit—private finance.—The improvement of agriculture has been upheld as a charitable object, *e.g.*, training in, or research on, improved methods of cultivation or breeding (*C. I. R.* v. *Yorkshire Agricultural Society* [1928] 1 K.B. 611). The same might be true, in the public interest, of the provision of additional or superior stock or equipment. The Board, however,

in an opinion delivered by Viscount Simonds, refused to uphold as charitable a scheme for cheap agricultural credit. A testator had left the residue of his estate to found a bank to lend money at low rates of interest to local planters in the West Indies. The difficulty lay in the unrestricted character of the scheme. It would extend to inefficient or profligate planters who fell into penury, as well as to progressive planters who were planning capital investment in better farm operations. Hence public benefit was not an essential element of the projected bank.

(Theobald 348.)

London Parochial Charities Trustees v. *Attorney-General* [1955] 1 W.L.R. 42; [1955] 1 All E.R. 1

Jurisdiction to modify schemes—Charitable Trusts Act, 1860, *ss.* 1–5.—In the ordinary way the court has a concurrent jurisdiction with the Charity Commissioners in the matter of amending schemes. It is useful, in particular, where difficult points of law might arise. In the instant case there was also some doubt as to whether the Commissioners or the Ministry of Education were the appropriate alternative authority.

A local statute had authorised a scheme for certain London charities which was to be approved by the Queen in Council. The scheme, as approved, gave the Charity Commissioners power to modify its terms.

Roxburgh J. held that this excluded the jurisdiction of the courts. The special statute of 1883 overrode the general statute of 1860, and he refused to do violence to its language so as to incorporate the earlier Act. *Re Berkhamsted Grammar School* [1908] 2 Ch. 25 was followed.

It is interesting to recall that the Nathan Report on the Administration of Charitable Trusts (Cmd. 8710) recently deprecated the special statutes which exclude the jurisdiction of the courts and that Recommendation 484 stated that "Charitable Trusts whose purposes are governed by private or local Acts of Parliament should in future be schemed by the relevant scheme-making authority *or by the court.*"

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4. *WILLS*

By A. Kiralfy, Barrister-at-Law

Re Makein [1955] 2 W.L.R. 43; [1955] 1 All E.R. 57

Inheritance—illegitimate son not entitled as dependant—Inheritance (Family Provision) Act, 1938, *s.* 1, *as extended to intestacies by the Intestates' Estates Act,* 1952.—Harman J. decided in this case, as a preliminary point of law, that an illegitmate son could not claim against the estate of an intestate, even assuming that the latter had admitted his paternity and brought the child up as his own. Even in

private documents the term "child" or "son" can only be given the meaning of a "natural child or son" in exceptional circumstances, *e.g.*, where it is named or identified or the testator cannot have meant to refer to a legitimate child. In a statute the meaning is even more strictly limited to the legitimate, *e.g.*, under the general statutory provisions for succession on intestacy.

The 1934 Law Reform Act, which extended the meaning for the purposes of certain tortious claims, says that for those purposes "a person shall be deemed to be the child of the deceased notwithstanding that he was only related to him illegitimately"; terminology which confirms the normal construction of statutory references to children.

The learned judge referred to illegitimate children whose existence was relevant to a claim in *Re Joslin* [1941] Ch. 200, and pointed out that no one had there suggested that they could have claimed under the Inheritance Act.

The Act was passed in derogation of the normal freedom of disposition of his property by an owner, and should not be given too wide a scope. It was unlikely that a statute passed to protect wife or child from destitution was intended to introduce illegitimate children as competitors for maintenance. Indeed, a mistress might otherwise feel that as an "unlawful wife" she might claim against the lawful widow.

(Theobald 94, 267 *et seq.*)

Re Cameron [1955] 1 W.L.R. 140; [1955] 1 All E.R. 424 (C.A.)

Will—annuity—deficits—continuing charge on income.—The Court of Appeal has affirmed the decision of Roxburgh J. (see 19 *Conveyancer* 67). The Master of the Rolls considered that the testator intended each year to be a separate accounting period and did not intend the distribution of surplus income, after providing for the annuity, to be suspended indefinitely in case later income in other years was insufficient to answer the annuity. There was, therefore, no continuing charge on income to meet deficits in bad years.

(Theobald 426.)

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5. *PLANNING CASE*

By T. A. Blanco White, Barrister-at-Law

R. v. *Minister of Housing, ex p. London Corporation*; reported *sub nom. London* v. *Cusack-Smith* [1955] 1 W.L.R. 363; [1955] 1 All E.R. 302.

Purchase notice—jurisdiction—"owner."—The House of Lords has now reversed the decision of the Court of Appeal (see 18 *Conveyancer* 87), which reversed the decision of the Divisional Court (see

17 *Conveyancer* 248), which (readers may remember) quashed a decision of the Minister confirming a purchase notice, the only point in the case, above the Divisional Court at least, being: Whether the word " owner " in section 19 of the Town and Country Planning Act, 1947, does or does not include a freehold reversioner of land not entitled to a rack-rent. Held, finally, that—probably through the incompetence rather than the malice of the legislature—such a freeholder does not count as an owner and cannot serve a purchase notice.

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6. *LANDLORD AND TENANT*

By J. Muir Watt, M.A., of the Inner Temple, Barrister-at-Law

Wright v. *Walford* [1955] 2 W.L.R. 198; [1955] 1 All E.R. 207

Rent Restrictions Act—landlord by purchase—purchase by subtenant of part of house of freehold of whole house—surrendering tenancy of whole house and grant of new tenancy of part—relationship brought into existence by purchase although incidents subsequently varied.—The subtenant of part of a house purchased the freehold, thus becoming the landlord of the person from whom he held his subtenancy. Later he served a notice to quit on the tenant but by agreement the tenant surrendered his tenancy of the whole house and became a contractual tenant of part. Later still the tenant was given notice to quit the part. The landlord claimed the possession of the part for his own occupation and contended that he had not become the landlord by purchase so as to be excluded by the parenthesis in paragraph (h) of the First Schedule to the 1933 Rent Act.

The Court of Appeal held that the landlord had become landlord by purchase within the meaning of the parenthesis. They rejected, in favour of this common-sense view, the contention that because there had been a technical change of tenancy, the exclusion did not apply. The landlord prayed in aid the dictum of Denning L.J. in *Littlechild* v. *Holt* [1950] K.B. 1, 7, that " it is the tenancy which is protected, whether it is a contractual tenancy which, since the purchase, has become a statutory tenancy, or whether it has been a statutory tenancy all the time. The protection is not lost by a contractual tenant assigning his interest to another, or by a member of the tenant's family succeeding to a statutory tenancy. But it is lost when the tenancy expires and a new one is voluntarily created." Evershed M.R. doubted this dictum in so far as it went beyond what was necessary for the decision in *Littlechild* v. *Holt*. It seemed to Evershed M.R. irrational that if the tenant who was in possession under a contractual tenancy when the landlord purchased later assigned for value to a third party the latter would get the protection of the provision. Romer L.J. was quite definite in rejecting the interpretation of " landlord " in the parenthesis as meaning " landlord of a *tenancy*." As *Fowle* v. *Bell* [1947] K.B. 242 and other cases, made it clear that the expression did not mean " landlord of the premises," the only remaining alternative was " landlord of the tenant." The fact that the character and incidents of the

relationship had been varied by the surrender and regrant did not prevent the landlord from having become landlord by purchase.
(Megarry, 7th ed., p. 265.)

Rajenback v. *Mamon* [1955] 2 W.L.R. 21; [1955] 1 All E.R. 12

Rent Restrictions Acts — agreement by tenant of rent-restricted dwelling to give up possession in consideration of a promise by the landlord to pay money—public policy—mutuality—whether contrary to Rent Acts.—In this case there was an agreement between the landlord and the tenant of a rent-controlled flat under which the tenant promised to give up possession at a certain date in consideration of a promise by the landlord to pay £300. Unlike the case of *Barton* v. *Fincham* [1921] 2 K.B. 291, it was the landlord in the present case who proved to be unwilling to carry out the bargain, and the tenant sought a declaration that in the event of his giving up possession as agreed the landlord was bound to pay the £300. Wynn-Parry J. gave judgment for the tenant. *Barton* v. *Fincham* was cited by the landlord in support of his contention that the agreement was unenforceable for want of mutuality and as being an attempt to contract out of the Rent Acts. In *Barton* v. *Fincham*, where there was a similar agreement, the tenant refused to give up possession and the landlord sought an order for possession. It was held there that the court could only make an order on one of the grounds laid down in the 1920 Act (now the 1933 Act), and could not give effect to the agreement. The position is, therefore, that the tenant but not the landlord can enforce such an agreement, an unsatisfactory result. If the point comes before a higher court it will no doubt look carefully to see whether such a result can be avoided.

Hern v. *Palmer* [1955] 1 W.L.R. 123; [1955] 1 All E.R. 396

Rent Restrictions Acts—question whether furnished letting—amount of rent attributable to furniture—substantiality of amount—no evidence of value of furniture—onus of proof.—The question at issue in this case was whether a letting was a furnished letting, as the landlord contended, or an unfurnished letting, as the tenant contended. The question depended on whether the amount of the rent attributable to the use of the furniture was substantial. At the trial in the county court no evidence was given of the capital value of the furniture or of its value to the tenant. There was, however, evidence of the amount of furniture in the house. The county court judge accepted a submission on behalf of the tenant that, in the absence of any proof that the amount of the rent attributable to the use of the furniture was a substantial portion of the whole rent, there was no case to answer, and gave judgment for the tenant. On appeal the Court of Appeal held as follows: (1) Despite the absence of evidence about the value of the furniture, there was some evidence on the issue whether this was a furnished letting, and the judge should not have ruled that there

was no case for the tenant to answer; (2) the correct course, however, in these cases is to produce evidence of the capital value of the furniture and of its value to the tenant in order that the judge can decide the question according to section 10 (1) of the 1923 Act; (3) in the circumstances there would have to be a retrial, and, according to the ordinary rule, before another county court judge; (4) as this was a Rent Acts case the tenant would not be bound at the retrial by the election he had expressed at the hearing to call no evidence.
(Megarry, 7th ed., p. 127; Rent Restrictions Guide, 3rd ed., p. 113.)

Davies v. *Gilbert* [1955] 1 W.L.R. 160; [1955] 1 All E.R. 415

Rent Restrictions Acts—land let together with house—old control —rateable value of land more than one quarter of rateable value of house—date for determining rateable value—date when possession is sought.—The short point in this case was what is the correct date for ascertaining the rateable value for the purpose of the rule in regard to dwelling-houses let with a substantial quantity of land, where old control applies. It will be remembered that in the case of old control land let together with a dwelling-house is to be treated as part of the dwelling-house if the rateable value of the land let separately would be less than one quarter of the rateable value of the house. Where the rule does not apply, the Acts are excluded. According to section 12 (1) (e) of the 1920 Act, the expression "rateable value" means, unless the context otherwise requires, the rateable value on August 3, 1914, or, in the case of a dwelling-house or a part of a dwelling-house first assessed after that date, the rateable value at which it was first assessed. In the present case 4½ acres of woodland attached to a cottage were not rated at all at the time when the cottage (rated at £4) was let to the defendant. In 1953, however, the 4½ acres, having been developed as a caravan site, were rated at £9. The plaintiff landlord sought possession in 1954. The Court of Appeal held that the cottage and land had not become subject to new control in 1939 but had continued to be subject to old control. The test laid down in section 12 (2) proviso (iii) of the 1920 Act, therefore, continued to apply, and the court held that the question whether the rateable value of the land if let separately would be less than a quarter of the rateable value of the house has to be determined at the time when the landlord seeks to enforce his rights, and not at the date of the letting. As the rateable value of the land when possession was sought was more than twice the rateable value of the cottage, the whole ceased to be subject to the provisions of the Rent Restrictions Act and the landlord was entitled to possession. Reliance was placed by the tenant on the "enigmatic subsection," section 12 (6), but once more the court refused to apply it. Reliance on this subsection has become a litigant's last resort.
(Megarry, 7th ed., p. 88; Rent Restrictions Guide, 3rd ed., p. 8.)

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7. *REVENUE CASES*

By David R. Stanford, m.a., ll.b., Barrister-at-Law

[*Note.*—Where a case is not reported in any of the general series of *Law Reports* it is cited from *Annotated Tax Cases* (A.T.C.) or *Taxation Reports* (T.R.).]

C. I. R. v. *Transport Economy, Ltd.* [1954] T.R. 417; 48 R. & I.T. 78 (Ch.D.)

Income tax—surtax direction—right to begin.

Statutory provisions: Income Tax Act, 1918, s. 137; Finance Act, 1922, s. 21 and Sched. I (now Income Tax Act, 1952, s. 52, and ss. 245 to 251).

Point: Where the assessing Special Commissioners made a direction that for the purposes of assessment to surtax the income of a company is to be treated as the income of its members, and the company appeals against such direction under what is now Income Tax Act, 1952, s. 247, the burden of justifying the direction is upon the Crown (*Thomas Fattorini (Lancashire), Ltd.* v. *C. I. R.* [1942] A.C. 643). The right and duty to begin therefore rests upon the Crown, such right and duty not being altered by statute. The same principle applies to any rehearing before the Board of Referees.

The normal procedure whereby the company opens its case and calls evidence, and the Crown follows, may still be adopted before the Special Commissioners if the company and the Crown agree, and the Special Commissioners consent to that course. Such procedure does not, however, shift the onus of justifying the direction from the Crown.

Facts and Decision: A company appealed from a direction under Finance Act, 1922, s. 21 (now Income Tax Act, 1952, s. 245), that its income for the accounting period ended March 31, 1949, should be treated as the income of its members for surtax purposes. At the hearing before the Special Commissioners the company submitted that the onus of showing that the direction was justified upon the facts lay on the Crown, and that it was for the Crown to open their case and call evidence in support. The Special Commissioners assented to this argument; the Crown thereupon called no evidence and the direction was discharged. On appeal, the Crown contended that the right and duty to begin was thrown on the company by Income Tax Act, 1918, s. 137 (4) (now Income Tax Act, 1952, s. 52 (5)), and also that on general principles the company was bound to begin as the "appellant."

Held: Income Tax Act, 1918, s. 137 (4) refers only to assessments and surcharges and not to "directions." The proceedings before the Special Commissioners was not an "appeal" in the normal sense for the direction was not made at a hearing, and the company is not heard or even present when the direction is made. The burden of justifying the direction being on the Crown, it was the Crown's right and duty to begin. The Special Commissioners were therefore correct in causing

the Crown to begin. The Crown having elected to call no evidence before the Special Commissioners the case was not referred back but the appeal was dismissed.

Commissioner of Income Tax v. *Bjordal* [1955] 2 W.L.R. 342; [1955] 1 All E.R. 401; 48 R. & I.T. 141 (P.C.)

Income tax—undistributed income—company in which public substantially interested.

Statutory provisions: Income Tax Ordinance, 1940 (Ordinance No. 8 of 1940 of the Uganda Protectorate), s. 21, as amended by Income Tax (Amendment) Ordinance, 1943 (Ordinance No. 11 of 1943 of the Uganda Protectorate), s. 5. These ordinances are similar in character to Income Tax Act, 1952, ss. 245 *et seq.*

Point: Like Income Tax Act, 1952, s. 245, the Uganda Ordinance excludes from the companies to which it applies companies "in which the public are substantially interested," the definition of that phrase being similar to that contained in Income Tax Act, 1952, s. 256 (5). There is, however, no provision that relatives are to be treated as a single person. The view was taken that, as in the case of the English statute, "the public" means all persons other than the controlling individual or individuals (*cf. Tatum Steam Navigation Co., Ltd.* v. *C. I. R.* [1941] 2 K.B. 194). The case is interesting in view of the discussion of the meaning of "control," which, it was held, meant holding 51 per cent. of the voting power. The argument advanced, that "control" meant holding 75 per cent. of the voting power so that a special resolution could be forced through, was rejected.

Facts and Decision: Hendrik Bjordal and S. H. Bjordal, his brother, held 73.96 per cent. and 25.99 per cent. of the aggregate of votes in respect of all issued shares of Bjordal Mines, Ltd. S. H. Bjordal had acquired his shares by unconditional purchase and held them beneficially. Five other persons each held one share of the 12,007 issued.

Held: Bjordal Mines, Ltd., was a company in which the public were substantially interested, for Hendrik Bjordal had control of the company and his brother, who was thus one of the public, held more than 25 per cent. of the voting power.

Moorhouse (*Inspector of Taxes*) v. *Dooland* [1955] 2 W.L.R. 96; [1955] 1 All E.R. 93; 48 R. & I.T. 29; 33 A.T.C. 410; [1954] T.R. 393 (C.A.)

Income tax—voluntary payment—perquisite or profit from employment.

Statutory provisions: Rule 1 of of the Rules applicable to Schedule E of the Income Tax Act, 1918 (now Income Tax Act, 1952, Ninth Sched., r. 1).

Point: If the holder of an office or employment is entitled to have frequent collections made for his benefit, such right being enforceable, and the collections are in respect of the excellent performance of his duties as such holder then, though voluntarily made by the donors, the proceeds of the collection are "perquisites or profits" of his office or employment. In drafting contracts for persons who may be entitled to have collections made for their benefit the summary of the law by Lord Justice Jenkins given below may prove an invaluable guide to "staying on the right side of the line."

Facts and Decision: A cricket professional was employed by the East Lancashire Cricket Club at a salary. It was provided by his contract that he should receive expenses and talent money, and also that "collections shall be made for any meritorious performance by the professional with bat or ball in" certain matches. Eleven such collections were made during the 1951 cricket season, the sum collected being £48 15s. He was assessed to tax on that sum under Schedule E.

Held (distinguishing *Seymour* v. *Reed* [1927] A.C. 554), that the collections were liable to tax in the hands of the recipient.

After considering *Herbert* v. *McQuade* [1902] 2 K.B. 631 (payment to vicar, to augment his income, by Clergy Sustentation Fund), *Cooper* v. *Blakiston* [1909] A.C. 104 (Easter offerings), and *Seymour* v. *Reed* [1927] A.C. 554 (professional cricketer's benefit), Jenkins L.J. continued (at 2 W.L.R. 111) as follows: "From these citations I deduce the following principles: (i) The test of liability to tax on a voluntary payment made to the holder of an office or employment is whether, *from the standpoint of the person who receives it,* it accrues to him by virtue of his office or employment, or, in other words, by way of remuneration for his services. (ii) If the *recipient's contract of service entitles him to receive the voluntary payment,* whatever it may amount to, that is a ground, and I should say a strong ground, for holding that from the standpoint of the recipient it does accrue to him by virtue of his employment, or, in other words, by way of remuneration for his services. (iii) The fact that the voluntary payment is of a *periodic or recurrent character* affords a further, but I should say a less cogent, ground for the same conclusion. (iv) On the other hand, a voluntary payment may be made in circumstances which show that it is given by way of a present or testimonial on grounds personal to the recipient, as for example, a collection made for the particular individual who is at the time vicar of a given parish because he is in straitened circumstances, or a benefit held for a professional cricketer in recognition of his long and successful career in first-class cricket. In such cases the proper conclusion is likely to be that the voluntary payment is not a profit accruing to the recipient by virtue of his office or employment, but a gift to him as an individual paid and received by reason of his personal needs in the former example, and by reason of his personal qualities or attainments in the latter example."

Re Hooper's 1949 Settlement [1955] T.R. 1; 48 R. & I.T. 125 (Ch.D.)

Re Hooper's 1934 Settlement [1955] T.R. 7; 48 R. & I.T. 127 (Ch.D.)

Income tax—beneficiary's repayment claim—uncertainty of trusts.

Statutory provision: Income Tax Act, 1952, s. 224.

Point: These are further cases under which the Revenue refused repayment claims by beneficiaries who had received payment under discretionary trusts on the ground that the trusts were void for uncertainty. The trusts were for the benefit of a class of persons including employees of a company, their wives, widows, children and dependants. It is interesting, as Mr. Justice Danckwerts distinguished *C. I. R.* v. *Broadway Cottages Trust* [1954] 3 W.L.R. 438, on the ground that the class was ascertainable although it was only ascertainable by means of an inquiry and the use of advertisements. He appeared to accept that the trustees would restrict the class by holding that certain persons (who were not traceable) would not be suitable objects of the discretionary power (see the affidavit evidence, T.R. p. 5).

Re Leven and Melville (Earl), decd., C. I. R. v. *Williams Deacon's Bank, Ltd and Others* [1954] 1 W.L.R. 1228; [1954] 3 All E.R. 81; 33 A.T.C. 333; 47 R. & I.T. 666 (Ch.D.)

Estate duty—"disposition"—"disposition in favour of a relative"

Statutory provisions: Finance Act, 1940, s. 44 (now amended by Finance Act, 1950, s. 46).

Points: (1) Both the original section 44 of the Finance Act, 1940, and the amended section apply where there has been a "disposition in favour of a relative." The question, whether or not the disposition is "in favour of a relative" must be decided at the date of the disposition and not at the date of death of the disponer. If the actual person who will enjoy the benefit is not ascertainable at the date of the disposition, and the class of possible beneficiaries includes "non-relatives," then the disposition is not a "disposition in favour of a relative within the section."

(2) The Finance Act, 1940, s. 44 (1), refers to "the creation or disposition in favour of the deceased of an annuity" (now subsection (1A) in the amended section 44). In this context "disposition" does not include the extinguishment of a liability to make annual payments. Compare Finance Act, 1940, ss. 45 (2) and 59 "disposition."

Facts and Decision: The deceased, life tenant of a strict settlement created by his brother, effected policies of insurance in the names of the trustees to cover the estate duty payable on the settled funds on his own death, such action being a condition of the settlement. In 1942 the policies were converted into fully paid-up policies and the deceased covenanted with the trustees that on his death his estate should bear all duties then payable on the settled funds. The deceased and his eldest son then barred the entail and the deceased released his life interest. Unfortunately, the deceased died within five

years of such release and estate duty became payable on the settled funds (Finance Act, 1940, s. 43). This duty, some £68,000, was paid out of the deceased's free estate in accordance with the covenant. The Crown sought to disallow the deduction of the £68,000 in computing the value of the deceased's estate for assessment to estate duty on the ground that the debt was not incurred for full consideration, the extinguishment of his liability to pay premiums being an " annuity " within Finance Act, 1940, s. 44 (1). It was admitted that the covenant to pay the estate duty on the settled funds was a " d.sposition " by the deceased.

Held: The £68,000 was a proper deduction from the estate of the deceased. In 1942 the person who would benefit from the " disposition " (*i.e.*, the covenant) was not ascertainable, being but one of a class of remaindermen. Such class contained persons who were not relatives of the deceased, and the disposition was not " in favour of a relative." Although this disposed of the action, Wynn-Parry J. went on to express his view that the extinguishment of the liability to pay premiums was not a " disposition . . . of an annuity " within the Finance Act, 1940, s. 44 (1).

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8. *MISCELLANEOUS*

Re Brixham Urban District Council [1955] 1 W.L.R. 5; [1954] 3 All E.R. 561n; 47 R. & I.T. 663

Rates and rating—withdrawal of appeal by valuation officer—rating authority's title to be heard.—In this case a local valuation officer made a proposal to alter the valuation list. When objection was made he served notice of appeal on the local valuation court under the Local Government Act, 1948, s. 48. On the hearing of such an appeal the rating authority is entitled to be heard. Relying on this right the rating authority, who agreed with the valuation officer, did nothing further. The valuation officer then withdrew his appeal and the valuation court accepted the withdrawal and declined to hear the appeal. The Divisional Court agreed with the valuation court and held that the appellant was entitled to withdraw his appeal and, if he did so, the rating authority had no *locus standi* to object or otherwise: they were not appellants, but a party entitled to be heard if there was in fact an appeal.

THE LIBRARY

A Guide to Land Registry Practice. Seventh Edition. By JOHN J. WONTNER. The Solicitors' Law Stationery Society, Ltd. 201 and (index) 18 pp. (25s.)

Mr. Wontner's well-known book continues its successful career principally, we suspect, because he has never lost sight of his object, to provide a guide to everyday practice, and been tempted to allow his book to become an exhaustive treatise dealing with all points, however infrequently encountered, of the law of land registration. Within his self-prescribed limitations, Mr. Wontner is thorough: he tells us, with his reasons, why the planner's enthusiasm for cluttering up the title with planning matters cannot be implemented in the case of registered land; and why voluntary registration is often applied for to the advantage of the landowner, though he does not mention that in the case of voluntary registration, though never where registration is in a compulsory area, the applicant will often have to pay for a survey.

There are some eighty-two pages of forms and our only real criticism is in connection with these. First, we suggest that it is unnecessary to set forth so many forms of application; one may be useful for the purpose of illustration; as for the rest, the list is sufficient. Secondly, it would be advantageous to put the forms into some coherent order, for example, keeping all the transfers together. Thirdly, the notes appearing on the printed forms in most cases need not be reproduced. And finally, the forms would be of greater use if either in this part of the book or in the text the principal restrictions, etc., were set forth.

There are appendices dealing with fees and costs.

At 25s. this remains a sound investment.

E. F. G.

Preston & Newsom's Restrictive Covenants Affecting Freehold Land. Second Edition. By G. H. NEWSOM, Barrister-at-Law. Sweet & Maxwell, Ltd. xxiv, 217 and (index) 9 pp. (35s.)

The courts of equity have, in developing the law relating to restrictive covenants, erected as jerry-built a structure as those to which many of the covenants are annexed, and the unsatisfactory state of the law on the subject is aggravated by the drafting inefficiency of many conveyancers. A scheme of development is nicely worked out but the builder's solicitor fails to confer the benefit of any covenants on the various buyers and thus brings the building scheme to naught, merely leaving an unsightly smear on the title. As Chapter 4 (drafting) appeared in the first edition of this work it is time the conveyancing standard improved. In the case of unregistered land these blots can be removed in course of time by omitting reference to them in subsequent conveyances, a procedure greatly facilitated by failure to register under the Land Charges Act. In the case of registered land, such a course is not so easily open to a landowner and he will often have to resort to the Lands Tribunal under the Law of Property Act, 1925, s. 84, and the Lands Tribunal Act, 1949. In this edition there is a new chapter on this procedure and the practitioner will find some useful guidance based on the mass of decisions that has already accumulated. Although the law on the subject has not materially changed, it seems clear that the Tribunal construes the

section far more strictly than its predecessors, who were inclined to allow modification on payment of compensation where perhaps the covenants were obsolescent rather than obsolete and would deal with an application on the footing that the covenants might not be enforceable thus making an application to the court for a declaration as to their unenforceability unnecessary. One gathers that applications are now treated more technically (and thus more expensively), and practitioners, both for applicants and objectors, must prepare their cases with greater care.

This is the only major change, but Mr. Newsom has brought the book up to date. The *Newton Abbot Co-operative Case* [1952] Ch. 286 comes under detailed criticism. It will be remembered that in that case it was held that extrinsic evidence might be given to show the land to be benefited by a covenant. Mr. Newsom, in good company, prefers the view of Bennett J. in *Re Union of London & Smith's Bank Conveyance* [1933] Ch. 611 that the land to be benefited must be indicated in the instrument creating the covenant.

It is probably unnecessary to mention that the authors' exposition is enhanced by an extremely lucid style.

E. F. G.

The Solicitor's Guide to Development and Planning. By R. N. D. Hamilton Second Edition. Solicitors' Law Stationery Society, Ltd. 192 pp. plus xv. (22s. 6d. net.)

This is another new edition necessitated—and justified—by the Town and Country Planning Act, 1954. Although it covers much the same subject-matter, it is quite different from Mr. Heap's book, *Outlines of Planning Law*, as it lives up to its title and is obviously written almost exclusively for solicitors. Students would certainly be lost with much of this book—and so would some members of the other professions concerned with transactions in land.

To practising solicitors however, this new edition will be extremely valuable. Such matters as inquiries before contract, enforcement notices (we particularly liked the tabular method of summarising challenge action to these notices, on p. 77) and planning appeals are discussed in detail, and the arrangement (and even the notation) of the various maps and documents that go to make up a development plan is also explained fully. Procedure under the new Act is of course given due treatment, but the length and complication of its provisions has not been allowed to knock the book off balance.

Probably the most useful chapter in the book is the last one, "Conveyancing Practice." In this chapter, the author has included a number of carefully thought out answers to such questions as "how to ascertain that no development plan will adversely affect your client"; and it is rather comforting to think that a definite answer could ever be obtained to such a question! Also, can it ever be possible to ensure that future development will be permitted? —the author's answer of course is to make a formal application for planning permission—but even then there may be a subsequent revocation under section 21 or section 26 of the 1947 Act. Unlike some practitioners we have met, the author has not forgotten all about development charges when investigating title (see p. 167).

The book is based on articles which have appeared in the *Solicitors' Journal*, but there is no lack of cohesion or unevenness of treatment, and most of our readers will find it well worth its reasonable price.

J. F. G.